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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-994

SCHOOL COMMITTEE OF SPRINGFIELD,
PETITIONER,

v.

BOARD OF EDUCATION ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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SCHOOL COMMITTEE OF SPRINGFIELD,
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Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Petitioners William C. Sullivan, Mary M. Lynch, Francis P. Coughlin, Melvin L. Hunter and Wilbur J. Hogan, as members constituting a majority of the School Committee of the City of Springfield, pray that a writ of certiorari be issued to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on November 12, 1974.

Opinions and Orders Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, not yet reported, appears in the Mass. Adv. Sh. (1974) 2031. A concurring opinion

by Justice Quirico with whom Justices Reardon and Braucher joined appears at pp. 2058-2063. Addendum by Chief Justice Tauro appears at pp. 2064-2082. These opinions will be found in Appendix A to this petition.

Jurisdiction.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on November 12, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

Questions Presented.

I.

Whether the Massachusetts legislature may amend the 1965 Massachusetts racial imbalance law?

II.

Whether chapter 636 of the Massachusetts Acts of 1974 is an act of de jure segregation?

III.

Whether chapter 636 of the Massachusetts Acts of 1974 is unconstitutional?

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendments V, X, XI, XIV, Section 1.

Massachusetts Acts of 1974, c. 636.
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c. 15, §§ 1I, 1J.
c. 71, §§ 37C, 37D.
c. 76, § 12A.

These will be found in Appendix B to this petition.

Statement of the Case.

This case is of utmost importance because to date Springfield and Boston are the only two cities in Massachusetts where the State has ordered racial balance plans to be implemented in compliance with the 1965 Massachusetts racial imbalance law. If this decision of the Massachusetts Supreme Judicial Court is permitted to stand, Boston and Springfield, the two heaviest populated cities in the state, would be required to adhere to plans drawn in compliance with the 1965 law, whereas all other cities and towns would be governed by the 1974 law.

This case reflects the history of the School Committee of the City of Springfield attempting to comply with the 1965 racial imbalance law of the Commonwealth of Massachusetts which is contained in Massachusetts General Laws c. 71, § 37D, and c. 15, §§ 1I and 1J. In broad outline these sections of chapter 15 and chapter 71 required local school committees to adopt plans for the elimination of any racial imbalance existing in the public schools. Whenever a local school committee failed to adopt an acceptable plan of its own, the state Board of Education was empowered to require the implementation of a plan which it deemed satisfactory. The 1965 legislation contained no limitations on the devices for achieving racial balance (e.g. redistricting, busing which the Board could direct local school committees to utilize.

Since 1965 Massachusetts has endeavored to facilitate the implementation of an educationally progressive, equitable and workable statute to eliminate racial imbalance in its cities and towns.

Between 1966 and 1969 the Springfield School Committee submitted three separate plans for the complete elimination of racial imbalance in every grade and every classroom in every one of Springfield's public schools. Those plans relied on school construction, open enrollment and busing as the means to achieve racial balance. All of these plans were approved by the State Board of Education.

In January of 1971, the Board of Education was not satisfied with the progress being made and ordered the withholding of state school aid from Springfield until the School Committee submitted an acceptable short-term plan to achieve racial balance.

The School Committee brought a bill for judicial review of the State Board's actions under Massachusetts General Laws, c. 15, § 1-J, and the Supreme Judicial Court of Massachusetts held that the State Board had acted improperly and prematurely in ordering the witholding of state aid and ordered that the funds be released to Springfield. *Springfield School Committee* v. *Massachusetts Board of Education*, Mass. Adv. Sh. (1972) 1543. The case was remanded to the county Superior Court with instructions to ensure the filing and implementation of a short-term balance plan with appropriate assistance from the State Board. This plan was to achieve racial balance in all city schools by September, 1973. This decision was handed down on September 7, 1972.

In June, 1973, the Superior Court ordered the School Committee to file a plan immediately. The School Committee filed a plan which provided for the racial balancing of grades 5-12 and left grades K-4 imbalanced. At that

point, the Board appointed a hearing examiner to conduct hearings on the plan filed by the School Committee, as well as on a plan prepared by the Quality Integrated Education Committee. The School Committee had no say on the appointment of said hearing examiner.

The hearing examiner appointed by the State Board conducted hearings in August, 1973, and issued a report in which he recommended adoption of a so-called six-district plan which was adopted by the State Board and on October 12, 1973, the State Board ordered the Springfield School Committee to adopt and implement this plan.

The School Committee filed a bill for judicial review challenging the legality of the proceedings before the hearing examiner appointed by the State Board and requesting that the Board be enjoined from enforcing its opinion and order.

In April, 1974, the case reached the Full Bench of the Massachusetts Supreme Judicial Court and on May 1, 1974, the Supreme Judicial Court issued its opinion rejecting each of the School Committee's objections to the proceedings before the hearing examiner appointed by the State Board and held that the State plan conformed to the 1965 racial imbalance law in every respect and ordered implementation of said plan by September, 1974.

On July 26, 1974, chapter 636 of the Acts of 1974 was signed into law by the Governor of Massachusetts after having been passed to be enacted by the Massachusetts Senate and the Massachusetts House of Representatives. This Act was intended to take effect immediately as indicated in the language of the emergency preamble as follows:

> "I further declare that in my opinion said law (St. 1974, c. 636) is an emergency law and the facts constituting the emergency are as follows: It is essential that the provisions of this Act take effect immediately in

order to permit its orderly administration during the school year which will soon commence."

The Governor made his support for chapter 636 explicit on May 20, 1974, in his message to the legislature wherein he emphasized his desire to retain the goal of the 1965 racial imbalance law, but to adjust it to the realities of 1974.[1]

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[1] "I recognize that the 'Racial Imbalance Law,' designed to serve as a bridge to high quality education for all the children of the Commonwealth may, because of changing circumstances, become a barrier rather than a bridge. Nevertheless, I do not accept the arguments of those who say that now is the time to turn away from the Law. *I say that this is the time to turn towards the Law—to act to revise it, not to reject it.*

"Although the emergency preamble to the Law indicated that its purpose is ". . . to eliminate forthwith racial imbalance in the public schools . . . ," we know that the objective has not yet been attained. Frustration with the law and its impact has increased. We have seen this frustration on the faces of our fellow citizens and we have heard it in their voices. Now, however, that frustration is not confined to one segment of our society or to any particular geographic areas. The law has not brought fast fulfillment of the aspirations of those seeking equal educational opportunity. In addition, the law is perceived by many as a menace to the quality of education now available. Any law, once it no longer has the assent of the society it serves, is in danger of becoming an object of contempt. This must not be allowed to happen to the "Racial Imbalance Law."

I am, therefore, submitting to you legislation which will retain the goal of the Law, but which will adjust it to the realities of 1974. This legislation emphasizes voluntary action and incentives. Its theme is the reduction of racial imbalance and racial isolation by means of voluntary transfers and educational enrichment programs. I seek a statute which will foster compliance, not contempt; a statute which will promote cooperation, not confrontation.

"The legislation entitled "AN ACT AMENDING THE RACIAL IMBALANCE LAW," appearing as Appendix A, contains authorization for the voluntary transfer programs which will serve to reduce the potential for confrontation and which will encourage a sub-

Chapter 636 of the Acts of 1974 was intended to amend chapter 15, sections 1I-1K and chapter 71, sections 37C and 37D. Chapter 636 greatly increased the amounts and kinds of state aid that would be paid to local communities for racial balance planning, such as payment of 75 per cent of construction costs, 100 per cent of transportation costs and other financial benefits. It put no limitation on the means by which a school committee could eliminate racial balance, but it limited the measures which the State Board could employ in requiring school committees to balance their schools. Chapter 636 allows the State Board to order school committees to balance their schools by the use of portable classrooms and the construction of additions to or changes in the use of existing buildings, but it does not allow the State Board to use any other methods such as busing.

On August 2, 1974, the School Committee filed in the Supreme Judicial Court a motion to vacate the final decree and order entered on May 15, 1974. The gravamen for this motion was that chapter 636 had amended the racial imbalance law so as to eliminate the "legal basis" for the State Board's opinion and order which the final decree of the Supreme Judicial Court ordered into effect.

This case reached the Full Bench of the Supreme Judicial Court. In an opinion entered November 12, 1974, the Supreme Judicial Court held that chapter 636 of the Acts of 1974 constituted a violation of the Fourteenth Amendment of the United States Constitution insofar as it was

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stantial reduction of the present levels of racial imbalance and racial isolation. Under the terms of the legislation I propose, the parents of every minority child attending an imbalanced school will be guaranteed the option of sending him or her to a racially isolated school (one that is less than 30% non-white). The local school committee, subject to supervision by the Board of Education, will be responsible for informing parents of the options available to them." (Emphasis supplied.)

intended to forestall the implementation of the Sate Board's racial balance plan and that any attempt by the School Committee to rely on chapter 636 in an attempt to rescind the plan was unconstitutional. The Supreme Judicial Court further held that any action taken either by the legislature or by the Springfield School Committee which would tend to reverse or impede the action taken by the School Committee in attempting to comply with the 1965 racial imbalance law would be unconstitutional.

In a concurring opinion, three Justices of the Massachusetts Supreme Judicial Court held that the constitutional issues should not be reached or decided.

The Chief Justice wrote a reply to the concurring opinion in which he stated:

> "In the instant case, we have before us one attempt to shape the educational system which instructs the Commonwealth's young. The Legislature, responsive to public concern over racial imbalance solutions, has enacted an amendment which alters the array of available and necessary remedies for achieving racial balance. We have a public duty to express, promptly and categorically, our view of the amendment's constitutionality. No unrealistic hopes should be built on an unconstitutional statute. No hopes should be thwarted by an unconstitutional statute. This is our opportunity to give direction. We have properly decided these questions now and have avoided further delay.
>
> "In sum, resort to statutory construction was meant to be applied, when indicated, to *avoid* unnecessary and needless confrontation with the Legislature. It was not intended as a means to *evade* important constitutional issues when the facts and posture of the case clearly require their prompt resolution. Cf.

DeFunis v. *Odegaard*, 416 U.S. 312 (1974)." Mass. Adv. Sh. (1974) at 2079-80, 2082. (Emphasis in original.)

Reasons for Granting the Writ.

I.

THE RULING OF THE MASSACHUSETTS SUPREME JUDICIAL COURT THAT ANY ACTION TAKEN EITHER BY THE MASSACHUSETTS LEGISLATURE OR THE SPRINGFIELD SCHOOL COMMITTEE WHICH WOULD TEND TO REVERSE OR IMPEDE PROGRESS MADE TOWARD THE ACHIEVEMENT OF RACIAL BALANCE IN SPRINGFIELD UNDER THE 1965 MASSACHUSETTS RACIAL IMBALANCE LAW WOULD BE UNCONSTITUTIONAL, IS WITHOUT BASIS IN LAW, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND IS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Massachusetts was the first and is still the only state in the nation to have a racial imbalance law. Its legislature, its other branches of government, and its people have had to adjust and restructure their planning to the implementation of this law enacted in 1965 and designed to have a specific racial mixture in each and every classroom.

The 1965 law was not enacted to enforce any constitutional rights. It simply focused on eliminating racial imbalance in the public schools, and went far beyond what is required by the Constitution and by the desegregation decisions of this Court.

The United States Supreme Court in *Milliken* v. *Bradley*, 42 L.W. 5249, 5256, clarified and underlined the basic principles with respect to the approach in dismantling de facto segregation when it declared:

> "In *Swann*, which arose in the context of a single independent school district, the Court held:

> 'If we were to read the holding of the District Court to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.'

"The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each school, grade or classroom."

Chapter 636 does not strip from local or state officials their power nor does it impose severe limitations on school officials' discretionary authority to take effective remedial action thereby constituting state action. This amendment to the racial imbalance act provides substantial financial incentives and inducements towards the elimination of racial imbalance. The Board of Education is vested with the authority to withhold funds for non-compliance with plans designed to eliminate imbalance and is empowered to make recommendations relative to such plans as "additions to existing school buildings, the use of leased or portable facilities and changes of use of school buildings." There is no classification created in the new statute which gives rise to any inference of racial discrimination. Chapter 636 gives all school committees in Massachusetts the authority to utilize every conceivable remedy, including transportation and redistricting, to reduce and eliminate racial discrimination.

Racial balance is not required by the United States Constitution. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S. Ct. 1260, 28 L. Ed. 2d 554 (1971).[2] See *United States* v. *Montgomery County Board*

[2] In the *Swann* case, the controversy concerned the elimination of a dual school system maintained by school authorities in a North Carolina county. The court held (at 15, 91 S. Ct. at 1275) that,

of Education, 395 U.S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (1969).

When a court determines that public school segregation has resulted from actions of public officials, the court has the duty to eliminate segregation. *Brown* v. *Board of Education of Topeka, Kansas,* 349 U.S. 294, 75 S. Ct. 753 (1955); *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 93 S. Ct. 2686 (1973); *Green* v. *County School Board,* 391 U.S. 340, 88 S. Ct. 1689 (1968).

There never has been any finding of de jure segregation in Springfield. *Opinion of the Justices,* 298 N.E. 2d 840, 843, 844, Mass. Adv. Sh. (1973) 1027.

The State is not required to eliminate or reduce *de facto* segregation. *School Committee of Springfield* v. *Board of Education,* 287 N.E. 2d 438, 447-448, Mass. Adv. Sh. (1972) 1543, 1552-1553.

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where such State-imposed segregation has existed, the objective must be "to convert to a unitary system." See *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). But the court continued (*Swann,* 402 U.S. at 16, 91 S. Ct. at 1276): "In seeking to define even in broad and general terms how far [the] remedial power [of Federal courts] extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. . . . School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students. . . . To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court." Moreover, it is perhaps also significant that the court indicated no disagreement with 42 U.S.C. § 2000c-6 (1970), which expressly disclaims any intention to create a Federal right of action for "so-called 'de facto segregation,' where racial imbalance exists . . . but with no showing that this was brought about by discriminatory action of state authorities." See pp. 17-18, 91 S. Ct. p. 1277. See also pp. 22-23, 91 S. Ct. 1267; *Wright* v. *Council of Emporia,* 407 U.S. 451, 461, 477, 92 S. Ct. 2196 (1972).

The Massachusetts Supreme Judicial Court had previously stated that in the Springfield case only the "State policy of racial imbalance is involved." *School Committee of Springfield* v. *Board of Education,* 287 N.E. 2d 438, 454, n. 21 *Swann, supra,* 402 U.S. 1, 17-18, 30-31; 91 S. Ct. 1267, 1277.

It previously recognized that there is nothing to prevent the legislature from forbidding the involuntary assignment of pupils to achieve that racial balance which is not required by the Federal Constitution. *School Committee of Springfield* v. *Board of Education,* 287 N.E. 2d 438, 453, n. 19, Mass. Adv. Sh. (1972) 1543, 1561, n. 19.

The Massachusetts Supreme Judicial Court's ruling forbids the Massachusetts legislature from enacting any amendment to the 1965 Massachusetts racial imbalance law, which law requires a particular degree of racial balancing or mixing in all public schools. This is in direct conflict with the decision of this Court in *Milliken* v. *Bradley, supra,* and in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* and in violation of the United States Constitution.

II.

THE MASSACHUSETTS SUPREME JUDICIAL COURT RULED THAT ANY ATTEMPT BY THE MASSACHUSETTS LEGISLATURE OR BY THE SPRINGFIELD SCHOOL COMMITTEE TO RESCIND THE PRESENT SCHOOL ENROLLMENT STRUCTURE WOULD CONSTITUTE RESEGREGATION OF PREVIOUSLY IMBALANCED SCHOOLS AND WOULD THUS BE AN UNCONSTITUTIONAL ACT OF DE JURE SEGREGATION. THIS RULING IS UNCONSTITUTIONAL AND IN CONFLICT WITH THE DECISIONS OF THIS COURT BECAUSE IT MANDATES THE CONTINUANCE OF A SCHOOL STRUCTURE BASED UPON THE 1965 MASSACHUSETTS RACIAL IMBALANCE LAW WHICH THE GOVERNOR AND THE LEGISLATURE SEEK TO AMEND.

The 1965 racial imbalance law did not affect, alter, enlarge or constrict constitutionally protected rights. The

Board of Education is a creature of the legislature empowered to act pursuant to its statutory grant of authority. The legislature is competent to limit the powers, and change the focus of the Board of Education without offending the equal protection clause and triggering the strict-scrutiny test of the Fourteenth Amendment. See: *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973).

It should be emphasized that there has never been a judicial finding that the city of Springfield has practiced or endorsed segregation in its schools. Thus, the plan drawn in compliance with the 1965 law must be viewed as a plan to racially balance Springfield's five imbalanced schools, not a plan to desegregate. Therefore, it is vital to underline the fact that the vacating of this decree cannot be construed to infer that Springfield will be returning to a racially discriminatory and segregated school system. It is this critical factor that distinguishes the Springfield situation from such cases as *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D. N.Y. 1970), *Bradley* v. *Milliken,* 433 F. 2d 897 (6th Cir. 1970), *Oliver* v. *Kalamazoo Board of Education,* 368 F. Supp. 143 (W.D. Mich. 1973), *San Francisco Unified School District* v. *Johnson,* 479 P. 2d 669, wherein all held that there existed de facto segregation which was subsequently translated into de jure segregation.

The Massachusetts Supreme Judicial Court relied principally on two cases in reaching its result, *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L. Ed. 2d 830 (1967), and *Lee* v. *Nyquist,* 318 F. Supp. 710, aff'd, 402 U.S. 935 (1971).

In *Lee* v. *Nyquist,* the Federal District Court declared unconstitutional as violative of the Fourteenth Amendment a New York statute which expressly prohibited state education officials and *appointed* school boards "from assigning students, or establishing, reorganizing or maintaining school districts . . . for the purpose of achieving racial equality in

attendance." (At 712.) The New York statute prohibited the use of means to eliminate segregation and placed hurdles in the path of local school boards' existing efforts to eliminate the same. The Court noted at page 714 of *Lee* that: "It is clear, however, as [the Buffalo] Superintendent['s] deposition indicates, that [the statute in question] *severely inhibits the creation* and sitting of new middle schools and the adjustment of zone lines so as to achieve racial balance, as well as *the use of other devices aimed at reducing* racial segregation in the Buffalo public schools." (Emphasis added.) In a footnote to this sentence, the Court cites some of the devices employed to reduce racial imbalance in the schools which include the following which the statute would frustrate: "A voluntary open enrollment program. . . . The use of portable classrooms. The creation of a new peripheral school." (Footnote 6 on page 714.) The opinion discusses the legislative history of that statute by citing a segment of a legislator's speech which suggests that the only purpose of the law was to impede the integration of New York Schools. The Court draws support from *Hunter* v. *Erickson*, 393 U.S. 385 (1969), by declaring that the classification is an " 'explicitly racial [one] whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." The Federal Court's opinion states that "The statute, by prohibiting the implementation of plans designed to alleviate racial imbalance . . . except with the approval of a local elected board [the state officials and appointed boards are precluded from so acting] . . . creates a single exception to the broad supervisory powers [of the] Commissioner of Education." (At 718.) The Court concludes that because the statute "completely *prohibits* the implementation of such policies where the local board is not elected . . . [t]he discrimination is clearly based on race

alone and [is therefore] racial classification." (Emphasis in opinion.) (At 719.)

In *Reitman,* the United States Supreme Court concluded that an amendment to the California State Constitution was unconstitutional, violating the equal protection clause of the Fourteenth Amendment. Here, via an initiative, a referendum was placed on a state-wide ballot, the substance of which provided that "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person . . . to decline to sell, lease or rent . . . to such person or persons as he, in his absolute discretion, chooses." 387 U.S. at 371, 18 L. Ed. 2d 830, 832. This amendment effectively repealed the Unruh open-housing legislation and banned enactment of such laws, thereby implicitly endorsing private discrimination. Although private discrimination was countenanced prior to the enactment of the Unruh legislation, and although it was "conceded that the State was permitted a neutral position with respect to private racial discriminations . . . [nevertheless] because [of] a significant state involvement in private discriminations [it] amount[ed] to unconstitutional state action." *Id.,* 387 U.S. at 374-75.

The application of *Reitman* to chapter 636 is totally inapposite. Chapter 636 has the unqualified support from both the executive and legislative branches with respect to the reduction and elimination of racial imbalance, not its perpetuation, either expressed or implied. The intent is not to provide a shelter for those who wish to discriminate, privately or publicly. The legislature's action, using the words of *Reitman,* viewed in its "historical context, the immediate objective and [its] ultimate effect," is captured in the preamble to the statute: "the elimination of racial imbalance in the public schools." Again, as the Governor noted in his message to the General Court,

> "Since the passage of the Act in 1965 the executive, legislative and judicial branches of our government have repeatedly reasserted a commitment to the policy embodied in the racial imbalance law. The courage and determination of each branch has been tested time and time again."

Chapter 636 is different from *Reitman, supra,* both in fact and in spirit. Employing the tests set forth in *Reitman,* this amendment to the 1965 Massachusetts racial imbalance law is constitutional. Since 1965, the Commonwealth has endeavored to facilitate the implementation of an educationally progressive, equitable and workable statute to eliminate racial imbalance in its cities. Surely, inasmuch as the Commonwealth is the first state in the nation to have such a law, both the legislature, other branches of government, and the people have had to adjust and restructure their respective approaches to the eventual implementation of the statute. Thus, in its "historical context" it is clear that the law—as other pieces of progressive legislation—has evolved and matured into a viable instrument of social change. Its "immediate objective," as indicated in its preamble, is its immediate implementation so as to accomplish the "elimination of racial imbalance in the public schools." The "ultimate effect" is a corollary to the second proposition, namely, to secure the advantages of a totally integrated educational system, coupled with public support.

The amendments to the racial imbalance law, neither expressly nor as applied, do not serve to undermine or revoke the ultimate intent of the statute. The School Committee's hands are not tied. Indeed, school officials have the discretionary authority to take the effective remedial action; to ameliorate racial imbalance where it exists.

The statutory language does not circumscribe such authority, for any such recommendations and any such mandatory plans may include additions to existing school buildings, use of leased or portable facilities and changes of use of school buildings.

Clearly, it cannot be said that such action on the part of the legislature constitutes state action. The Commonwealth by this statute has given no affirmation, encouragement or assistance to the private parties who may wish to discriminate. As in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177 (1972), the possible incidental benefits to those who might wish to circumvent the racial imbalance law do *not* significantly involve the State with a private club's [individual's] racial policies [attitudes]. The mere existence of a statistical imbalance ought not to give rise to an inference of a conscious intent to segregate (*Swann, supra*) and thus precipitate the strict scrutiny dimension of the Fourteenth Amendment. Clearly, the statute is neutral in the sense of neither promoting nor imposing racial imbalance.

It is submitted that the language, scope and intent be viewed from the perspective of *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), wherein Justice Douglas, speaking for a unanimous Court, declared:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no

further than invidious discrimination. We cannot say that that point has been reached here." (At 489.)

III.

The Decision of the Massachusetts Supreme Judicial Court that Chapter 636 of the Massachusetts Acts of 1974 is Unconstitutional is in Conflict with the Decisions of this Court.

The rights vested pursuant to the 1965 racial imbalance act were not in the nature of fundamental constitutional rights for the simple reason that the State was not then and is not now under any affirmative duty to promote racial balance. See *Springfield I; Milliken* v. *Bradley, supra.* It is to be emphasized that the genesis of the Massachusetts racial imbalance law was not in response to a finding by a court of state imposed de jure/de facto segregation in its schools, but the Commonwealth's desire to reduce and eliminate all *racial imbalance.* Thus, it cannot be said that an amendment which re-enacts the original law—a statute which was not passed because of the Fourteenth Amendment or because of any other constitutional, statutory or court mandate—is intended to frustrate the Fourteenth Amendment or give rise to an equal protection analysis.

The statute's ultimate effect does not permit the state to take a neutral position with respect to racial discrimination. The statute clearly represents a reaffirmation of the goals of the 1965 racial imbalance act with an alternative remedial scheme.

It would be anomalous to suppose that the 1965 Massachusetts racial imbalance law would be in the singular position of forever remaining static in the field of the dynamics of social and economic legislation where the only certainty is the inevitability of change. The mere enactment of an *amendment* which is committed to maintaining the same

legislative policy of promoting racial balance at this point in time cannot be viewed as unconstitutional.

It is well-settled that racial balance is not required by the Federal Constitution, although a state may, in its discretion, adopt a policy of achieving racial balance in its public schools. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). This principle was reaffirmed by the United States Supreme Court in *Milliken* v. *Bradley*, 42 U.S.L.W. 5249, 5256 (7-25-74). Since there has been no determination that a situation of de jure segregation [3] persists in Springfield, but, rather, a determination to the contrary,[4] it cannot be maintained that the State is under an obligation to take any sort of affirmative action in this area. However, the legislature, in its wisdom, has seen fit to do what is not required of it by enacting St. 1974, c. 636. In light of this affirmative step forward to eliminate racial imbalance (see St. 1974, c. 636, § 4, *amounting and reenacting* G.L. c. 71, § 37C), it is inconceivable how a constitutional challenge could prevail against St. 1974, c. 636, since it commits the Commonwealth of Massachusetts to an affirmative program which far exceeds the mere prohibitory restraints of the Fourteenth Amendment to the United States Constitution and Articles 1, 10 and 12 of the Declaration of Rights of the Massachusetts Constitution.

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[3] The de jure/de facto distinction is still operatively determinative in fixing the obligation of the State in this area. See *Milliken* v. *Bradley*, 42 U.S.L.W. at 5255; *Morgan* v. *Hennigan*, 72-911-G, at 140, 148 (slip opinion) (D. Mass. 1974). See also *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196, 200, 205-206, 208 (1973); *Board of Education* v. *Swann*, 402 U.S. 43, 45, 46 (1971); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972), *affirming* 326 F. Supp. 1235, 1242 (D. N.J. 1971); *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958); *Brown* v. *Board of Education*, 347 U.S. 483, 493-95 (1954).

[4] *Springfield I*, *supra*, 287 N.E. 2d at 448. *Accord*, *Springfield II*, *supra*, 311 N.E. 2d at 69.

Upon analysis, the rationale of *Reitman, supra,* poses no threat to the constitutionality of St. 1974, c. 636. In *Reitman, supra,* subsequent to the enactment of California state statutes affirmatively proscribing private discrimination in the sale of housing, the State Constitution was amended to prevent the State from interfering with a private individual's right to discriminate. The Court found the amendment to be unconstitutional because, beyond merely repealing the prior statutes, it perpetuated existing discriminations by significantly involving the State in invidious discrimination. *Reitman, supra,* at 376-77, 380-81. In *Reitman* the court proposed a tripartite test to determine if judicial enforcement of a state law would amount to unconstitutional state action under the Fourteenth Amendment, whereby the Court must examine a statute's " 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' " *Reitman, supra,* at 373 (citations omitted).

The "immediate objective" of St. 1974, c. 636, was clearly to modify the remedial scheme of the 1965 racial imbalance act in time for its implementation in 1974. See St. 1974, c. 636, *Emergency Preamble.* Unlike the situation in *Reitman, supra,* St. 1974, c. 636, was not enacted to repeal prior existing affirmative action type statutes, nor was St. 1974, c. 636, designed to promote a neutral state policy. Rather, St. 1974, c. 636, represents a reaffirmation of the goals of the 1965 racial imbalance act with an alternative remedial scheme. It can hardly be said to be retrogressive or even neutral.

The statute's "ultimate effect," unlike the situation in *Reitman, supra,* does not permit the State to take a neutral position with respect to discrimination. St. 1974, c. 636, still charges the State Board with the duty to consult and review local plans designed to eliminate racial imbalance.

The State Board still has the authority to order mandatory plans which may include "any of the following measures, and no others, to meet the requirements of [G.L. c. 71] section thirty-seven D: additions to existing school buildings, use of leased or portable facilities and changes in use of school buildings." St. 1974, c. 636, § II. Additionally, the statute further affirmatively involves the State in the elimination of racial imbalance by offering financial incentives to local school boards who voluntarily include pupil transportation in their plans. Again, this program can hardly be called retrogressive or even neutral.

Finally, an examination of St. 1974, c. 636, and its "historical context and the conditions existing prior to its enactment" reveals that the statute reflects a legislative determination that the laudable goal of racial balance can best be attained by providing state financial incentives to encourage local school committees to employ pupil transportation, as opposed to permitting mandatory state imposed busing. This legislative determination suffers from none of the defects outlined in *Reitman, supra.* The statute does not "preserve de facto school segregation, or . . . hamper its removal," but rather affirmatively seeks to eradicate racial imbalance. Cf. *Opinion of the Justices,* Mass. Adv. Sh. (1973) 1027, 1036. See also Black, *Foreword: State Action, Equal Protection and California's Proposition 14,* 81 Harv. L. Rev. 69, 75 (1967). To conclude that St. 1974, c. 636, is unconstitutional would be to deny to the legislature the very essence of legislative power—the power to create, alter or amend, within constitutional limits, the contents of public rights and duties. See *Reitman, supra,* at 376; *Opinion of the Justices, supra,* at 1033.

> "[T]he grounds which prompt legislators or state voters to repeal a law do not determine its constitutional validity. That question is decided by what the law

> does, not by what those who voted for it wanted it to do, and it must not be forgotten that the Fourteenth Amendment does not compel a State to put or keep any particular law about race on its books. The Amendment only forbids a State to pass or keep in effect laws discriminating on account of race."

Reitman, supra, at 390-91 (Harlan, J., dissenting).

> "There is no question that the adoption of [St. 1974, c. 636] constituted 'state action' within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws.' "[5]

Reitman, supra, at 392 (Harlan, J., dissenting). It is true that the concept of "state action" has undergone significant evolution.

> "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."

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[5] Any claim that St. 1974, c. 636, should be subjected to the so-called "strict scrutiny" standard of judicial review is not supportable. See *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). Any rights which were allegedly acquired under the 1965 racial imbalance act are not in the nature of fundamental constitutional rights because the State was not and presently is not under any obligation to promote racial balance. See note 4, *supra.* See also Nowak, *Realigning the Standards of Review Under The Equal Protection Guarantee—Prohibited, Neutral and Permissive Classification,* 62 Geo. L.J. 1071, 1071-72, 1082-88, 1093-94 (1974). It should also be noted in this regard that since there has been no finding of de jure segregation in Springfield, the State has no obligation to do anything in this area except refrain from covertly or overtly impeding the operation of a unitary school system. Cf. *Board of Education* v. *Swann,* 402 U.S. 43, 44-45 (1971).

Keyes v. *School District No. 1,* 413 U.S. 189, 227 (1973) (Powell, J., concurring in part and dissenting in part).

Nevertheless, the unconstitutional State action which is complained of must serve to "create," or "assist" or "perpetuate" segregation, and not, manifestly, function to eradicate segregation like St. 1974, c. 636. There are innumerable methods which a state may constitutionally select, on its own initiative, to eliminate de facto segregation. See *State Remedies For Racial Imbalance: Increasing their Educational Impact,* 3 Columbia Survey of Human Rights, 1, 3-25 (1971). The use of some form of pupil transportation, whether it may be mandatory or voluntary busing, is merely one permissible alternative.[6] Although this alternative has generally been considered unpopular, St. 1974, c. 636, specifically permits it, and, in fact, encourages local school committees to employ busing through the financial incentive provisions mentioned earlier.[7]

[6] It should be noted that cases which have determined that various voluntary remedial measures, such as "freedom of choice" or "free transfer," are unconstitutional, are inapposite because those cases were predicated on findings of de jure segregation which required the states involved to take affirmative action to eliminate all remnants of state-imposed segregation. See *Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 191-200 (1973); *Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971); *Monroe* v. *Board of Commissioners,* 391 U.S. 450, 452-58 (1968); *Raney* v. *Board of Education,* 391 U.S. 443, 447 (1968); *Green* v. *County School Board,* 391 U.S. 430, 431-32, 438-39 (1968).

[7] The dissatisfaction with mandatory busing as a remedy for school segregation is illustrated by an examination of the extensive federal curbs which have been proposed and enacted. E.g., *Title IV, Civil Rights Act of 1964.* 42 U.S.C. § 2000c (b) (desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance); *District of Columbia Appropriations Act of 1968,* § 16, 81 Stat. 435, 441 (1967) (appropriations under the Act not to be used to assign or transport students in order to overcome racial imbalance); *Elementary, Secondary and*

Thus, since St. 1974, c. 636, has merely changed the remedial structure of the 1965 racial imbalance act in such a way as to continue to promote and encourage local school committees to eradicate racial imbalance,[8] and because the statute does not significantly involve the State in the perpetuation of racial segregation, it is constitutional.

The questions presented in this case are of great and recurring significance to our nation's public school systems and elsewhere. If this decision is left to stand, it means that whenever a state takes a courageous initiative in attempting to racially balance its school system, it may find itself locked into its initial structure and be forever prevented from making any meaningful amendments. This question should be decided by this Court in the interest of achieving quality education for all children rather than continued litigation.

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other Education Amendments of 1969, Public Law 91-380, §§ 209-210 (prohibits using of funds for forced busing of students); *Educational Amendments of 1972*, Public Law 92-318 (no funds may be used to transport students to carry out a plan of racial desegregation, without "the express written voluntary request of appropriate local school officials"). H.R. 69, the *Elementary and Secondary Education Act Amendments of 1974*, contains the most comprehensive anti-busing restrictions to date and has passed both the House and the Senate and awaits the signature of the President. See *Boston Sunday Globe*, August 11, 1974, at 18. See also *Drummond* v. *Acree*, 409 U.S. 1228 (1972).

[8] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the educational process." *Milliken* v. *Bradley*, *supra*, at 5257 (citations omitted).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts rendered herein on November 12, 1974.

Respectfully submitted,

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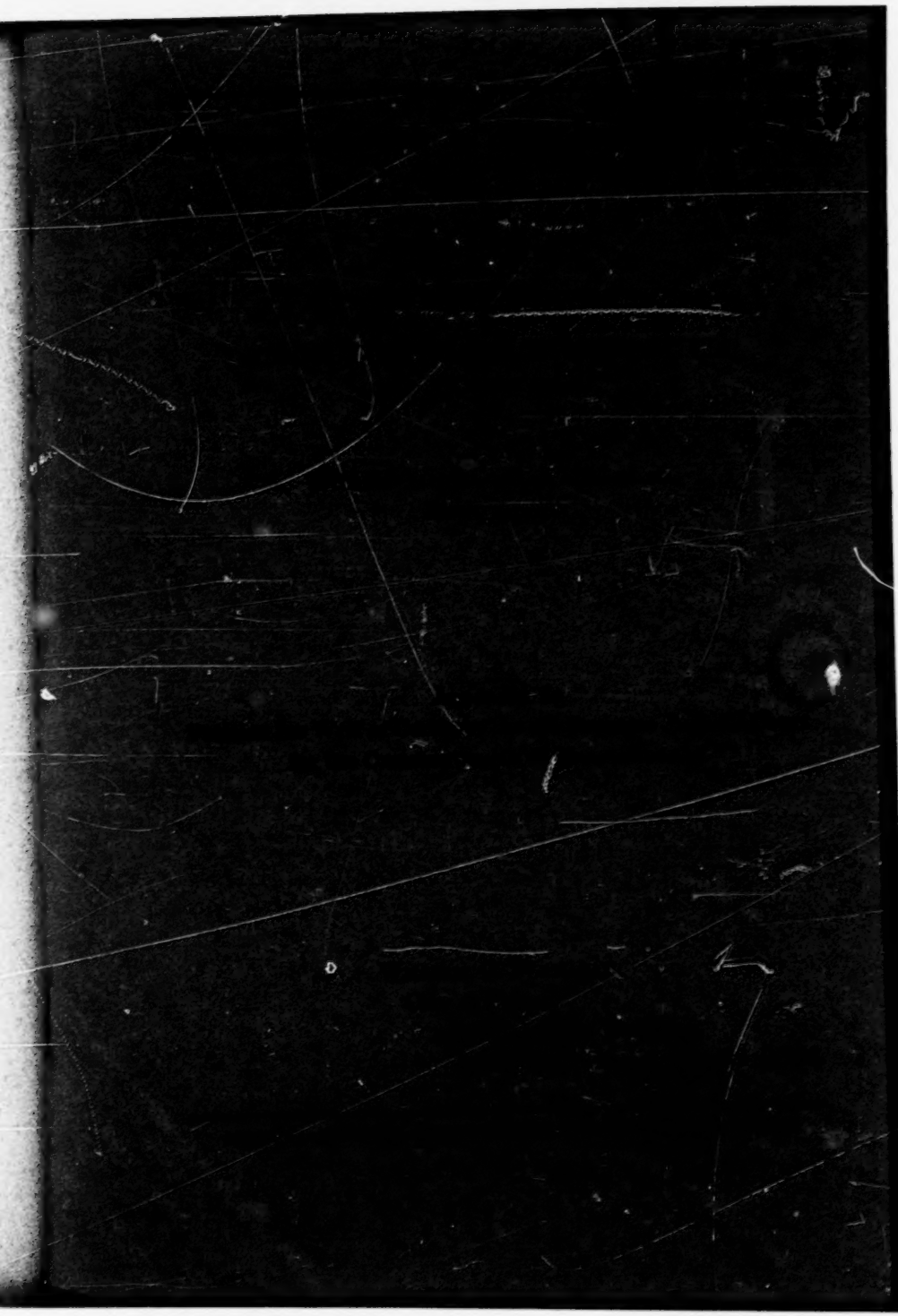

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH.

SCHOOL COMMITTEE OF SPRINGFIELD
v.
BOARD OF EDUCATION & OTHERS.

SUFFOLK, No. 43.

August 22, 1974. — November 12, 1974.

TAURO, C.J. On May 1, 1974, an opinion was issued in which we affirmed an opinion and order of the State board of education (board) which directed the school committee of Springfield (school committee) to implement immediately a plan designed to achieve racial balance in the schools of Springfield by the opening of the 1974-1975 school year. *School Comm. of Springfield* v. *Board of Educ.* Mass. (1974).*[1] We remanded the cases to the jurisdiction of the single justice of this court who, on May 15, entered a final decree after rescript requiring timely compliance with the board's opinion and order. On July 26, the Governor signed into law St. 1974, c. 636, an act which in §§ 1-6 amended the racial imbalance law.[2] Citing the

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* Mass. Adv. Sh. (1974) 657.

[1] Together with a companion case involving a suit brought by the interveners in the proceedings before the board.

[2] G.L. c. 15, §§ 1-IK, and c. 71, §§ 37C-47D, originally inserted by St. 1965, c. 641, §§ 1, 2.

new statute, the school committee, on August 2, filed in the county court a motion to vacate the final decree after rescript on the ground that the board no longer had statutory authority to require the use of various means to achieve racial balance which are included in its plan. A single justice of this court reserved and reported the case without decision to the full court. Because of the importance of the legal issues involved, an extraordinary summer session of the full court was scheduled, briefs were received from all interested parties and oral arguments were heard on August 22, 1974. In view of the then imminent opening of the Springfield schools, an early disposition of these proceedings was essential. Thus, on August 22, after due deliberation, the full court entered an order without an accompanying opinion. In so doing, the court denied the school committee's motion to vacate and reaffirmed all orders and decrees which had been entered in the case either by the full court or by a single justice thereof. In this opinion we now state the reasons underlying that order.[3]

This is the third time we have been called upon to intercede in the lengthy struggle to implement the racial imbalance law in Springfield. Although the history of that struggle is described in detail in our two earlier opinions.[4]

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[3] In rendering this opinion we note that, in spite of the sharply and the school committee and among the citizens of Springfield, divergent views which had previously existed between the board the responsible and coöperative efforts of all parties have resulted in an orderly and successful implementation of this court's order in the Springfield public schools.

[4] *School Comm. of Springfield* v. *Board of Educ.* Mass. (1972) (Mass. Adv. Sh. [1972] 1543) (Springfield I), and *School Comm. of Springfield* v. *Board of Educ.* Mass. (1974) (Mass. Adv. Sh. [1974] 657) (Springfield II).

nevertheless we deem it necessary on this occasion to review once again the historical context in which this case arises.

The original racial imbalance act, enacted in 1965,[5] declared the policy of the Commonwealth to be "to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools." G.L. c. 71, § 37C. In broad outline, the statute required local school committees to adopt plans for the elimination of any racial imbalance existing in their schools. Whenever a local school committee failed to adopt an acceptable plan of its own and refused to adopt recommendations of the board, the board was empowered to require the implementation

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[5] The act was passed in response to a lengthy report prepared by the Advisory Committee on Racial Imbalance and Education and two Task Forces appointed by the board. The conclusions reached in the report were summarized as follows:

"Our conclusions are clear. Racial imbalance represents a serious conflict with the American creed of equal opportunity. It is detrimental to sound education in the following ways:

"It does serious educational damage to Negro children by impairing their confidence, distorting their self-image, and lowering their motivation.

"It does moral damage by encouraging prejudice within children regardless of their color.

"It presents an inaccurate picture of life to both white and Negro children and prepares them inadequately for a multi-racial community, nation, and world.

"It too often produces inferior educational facilities in the predominantly Negro schools.

"It squanders valuable human resources by impairing the opportunities of many Negro children to prepare for the professional and vocational requirements of our technological society."

Report of the Advisory Committee on Racial Imbalance and Education, Massachusetts State Board of Education, Because It is Right -- Educationally, p. 2 (April, 1965).

of a plan which it deemed satisfactory. § 37D. The statute contained no limitations on the devices for achieving racial balance (e.g. redistricting, busing) which the board may direct local school committees to utilize. There was express provision for judicial review of the actions and orders of the board. § 37D.

Since the passage of the racial imbalance act there have at all times been at least five elementary schools in Springfield which are racially imbalanced within the meaning of the statute.[6] (An additional elementary school and a junior high school which were found to be racially imbalanced in 1965 were subsequently closed by the school committee.) Between 1966 and 1969 the school committee submitted and the board approved three separate plans for the elimination of racial imbalance in Springfield's schools. Those plans relied on school construction and on open enrollment programs as the principal means to achieve racial balance.

By the fall of 1970, however, it was clear that no substantial progress toward balancing the five imbalanced elementary schools had been made. In January of 1971, therefore, the board ordered the withholding of State school aid from Springfield until the school committee submitted an acceptable short-term plan to achieve racial balance. Although a compromise between the board and the school committee caused the State aid to be released to

[6] The following table reflects the percentage of nonwhite students enrolled in the five schools each year from 1965 through 1973:

	1965	1966	1967	1968	1969	1970	1971	1972	1973
Brookings	58.8%	65.7%	66.7%	71.7%	74.5%	72.3%	74.9%	75.9%	82.3%
DeBerry	90.9%	91.1%	89.6%	91.4%	92.3%	91.4%	91.3%	91.9%	95.1%
Ells	68.0%	71.3%	73.6%	77.8%	80.5%	87.5%	93.2%	93.0%	95.1%
Homer	58.5%	65.0%	58.6%	65.0%	69.2%	73.9%	74.9%	79.6%	88.1%
Tapley	77.3%	80.3%	83.0%	85.4%	85.2%	86.4%	82.5%	87.3%	88.7%

Springfield in February, the board again ordered State aid withheld in May, 1971, after the school committee had declined to adopt any one of three short-term plans which had been prepared by the Springfield school department. The school committee then brought a bill for judicial review of the board's actions (G.L. c. 15, § 1J).

In *Springfield I,* Mass. (1972),[b] [7] this court held that the board had acted improperly and prematurely in ordering the withholding of State aid and we ordered that the funds be released to Springfield. In addition, however, we made clear our lack of approval of the school committee's "performance . . . or perhaps lack of performance" in implementing the racial imbalance law, and we stated that: "Inasmuch as Springfield has failed to achieve racial balance in its elementary school system in the period since 1965, we think it is reasonable to require that the school committee, with appropriate assistance from the board, develop short-term measures consistent with G.L. c. 71, § 37D, which will achieve racial balance in all city schools by September, 1973." *Id.* at .[c] The case was remanded to the Superior Court with instructions to ensure the filing and implementation of a short-term balance plan.

After remand, at a hearing in the Superior Court in November, 1972, the school committee represented that it would file a short-term balance plan with the board by early 1973. In fact, no such plan was filed and in June, 1973, at the board's request, the Superior Court ordered the school committee to file a balance plan immediately.

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[b] Mass. Adv. Sh. (1972) 1543.

[7] See fn. 4, *supra.*

[c] *Id.* at 1566.

The school committee's response to this order was to file a four-page plan which it never approved and which provided for the balancing of only the fifth and sixth grades of the five imbalanced elementary schools.

At that point the board appointed a hearing examiner to conduct hearings on the plan filed by the school committee as well as on a plan prepared by a group of Springfield residents who had intervened in the proceeding and on a plan prepared by the Springfield school department and the Task Force on Racial Imbalance. At the conclusion of the hearings, which were held during August, 1973, the hearing examiner issued a report in which he recommended adoption of the plan prepared by the school department and the Task Force (the Task Force plan).[8] The board then received written objections to the hearing examiner's report, heard oral argument, and on October 12, 1973, issued an opinion and order in which it rejected the objections to the hearing examiner's report and ordered the school committee to adopt and implement the Task Force plan. By this time, of course, it was obvious that there was to be no compliance with the September, 1973, deadline which had been set in *Springfield I*.

The School committee thereupon filed a bill for judicial review challenging the legality of the proceedings before the hearing examiner and the board, and requesting that the board be enjoined from enforcing its opinion and order. The board filed an answer and a counterclaim seeking enforcement of its opinion and order.

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[8] Briefly, the Task Force plan requires the consolidation of Springfield's elementary schools into six districts, with each of the imbalanced schools in a separate district. Approximately 28% of the total population of each new district is nonwhite. Approximately 5,800 students are to be transferred pursuant to the plan. The longest distance any student would be bused is roughly five miles.

While the case was pending, a single justice of this court, in December, 1973, ordered the school committee "forthwith" to submit an implementation plan and proposed modifications for the Task Force plan in accordance with the board's opinion and order. The school committee appealed from and sought a stay of that order. The stay was denied on January 9, 1974, but by January 28 the school committee still had not complied with the order. On that date, at the board's request, a single justice of this court amended the earlier order to require compliance by the school committee no later than February 1. The school committee did submit an implementation plan on February 1, which plan the board modified and approved by an order dated February 11. On February 12 the board moved to amend its counterclaim to include a prayer for a preliminary injunction requiring the school committee to implement the Task Force plan in accordance with the implementation schedule. On February 20, after hearing oral argument, a single justice allowed the board's motion and granted the preliminary injunction.

The case reached the full court and was heard in April, 1974.[9] As noted above, we issued our opinion on May 1, 1974 (*Springfield II*).[10] In that opinion we rejected each of the school committee's objections to the proceedings before the hearing examiner and the board. We also reviewed the Task Force plan which the board had ordered implemented and held that it conformed to the law in every respect. We therefore concluded that the relief requested by the board's counterclaim should be granted and we ordered the entry of a decree affirming the board's opinion and order and requiring compliance therewith by Sep-

[9] See fn. 1, *supra*.

[10] See fn. 4, *supra*.

tember, 1974. In order that this latest deadline not meet the same fate as the 1973 deadline imposed in the *Springfield I* case, we ordered that the single justice retain jurisdiction of the cases to ensure implementation of the Task Force plan. On May 15, 1974, a single justice entered the final decree after rescript which is the subject of the present motion to vacate. Between May 15 and the beginning of August, there were no further legal proceedings and, we are told, the school committee was proceeding in accordance with the implementation schedule to put the Task Force plan into operation.[11]

On July 26 the Governor approved St. 1974, c. 636, declaring it to be an emergency law which should be immediately effective. Chapter 636 works several principal changes in the racial imbalance law.

First, upon certification by the board to a local school committee that racial imbalance exists in schools within that school committee's jurisdiction, it apparently is no

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[11] During the years of stubborn resistance to the implementation of the racial imbalance law in Springfield, the board was simultaneously struggling with an equally recalcitrant school committee in Boston. See *School Comm. of Boston* v. *Board of Educ.* Mass. (1973) (Mass. Adv. Sh. [1973] 161) (*Boston I*); *School Comm. of Boston* v. *Board of Educ.* Mass. (1973) (Mass. Adv. Sh. [1973] 275) (*Boston II*); *School Comm. of Boston* v. *Board of Educ.* Mass. (1973) (Mass. Adv. Sh. [1973] 1315) (*Boston III*). In addition, there were two legislative attempts to circumvent the board's powers under the racial imbalance law. See *Opinion of the Justices,* Mass. (1973) (Mass. Adv. Sh. [1973] 1927); *Opinion of the Justices,* Mass. (1974) (Mass. Adv. Sh. [1974] 545). The efforts by the board to enforce the racial imbalance law in Boston were followed in June of this year when the United States District Court, District of Massachusetts, ruled that the Boston school system had been operated in violation of the Fourteenth Amendment and ordered that plans be implemented immediately to accomplish desegregation of Boston's schools in September of this year. *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass. 1974).

longer incumbent on the school committee immediately to produce a plan to eliminate such imbalance. Amended § 37D requires the preparation of such a plan only after a school committee has received, and been unable to satisfy, a request by a nonwhite student attending a racially imbalanced school who wishes to be transferred to a school in which "racial isolation"[12] exists, or a request by a white student attending a racially isolated school who wishes to be transferred to a racially imbalanced school. In other words, school committees are not required to devise any racial balance plan until at least one student (or parent) has initiated a request for transfer of the specified type. Even then, no plan is required if the school committee is able to satisfy the particular request for transfer. It is only when transfer requests cannot be satisfied (because of lack of available seats) that a school committee must devise a plan to make such transfers possible.

Second, the statute provides certain financial inducements to local school committees (e.g., 100% State reimbursement of certain transportation costs; substantial State funding of the costs of establishing magnet school facilities). Noteworthy is the provision for payment by the State of $500 into a local "Equal Education Improvement Fund" for each student transfer of the type described above. The local school committees may use such monies for program to improve the quality of education within their respective jurisdictions. G.L. c. 15, § 1I, as amended.

Third, and most pertinent to the issue now before us, if it becomes necessary for a school committee to devise a plan to achieve racial balance, the board is required:

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[12] A "racially isolat[ed]" school is one in which not more than than thirty per cent of the pupils are nonwhite. G.L. c. 71, § 37D, as appearing in St. 1974, c. 636, § 5.

to provide technical and other assistance in the preparation of the plan; to approve or disapprove whatever plan is devised; to devise and order the implementation of its own plan whenever it is unable to approve a school committee's plan. Although there is no limitation on the means which a *school committee* may employ in order to eliminate racial imbalance, the *board* is strictly limited in terms of the measures which it may require school committees to employ. Any plan ordered by the board "may include any of the following measures, and no others . . .: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings." G.L. c. 15, § 1I, as amended.

Apparently on the basis of these changes in the racial imbalance law, the school committee on August 1 passed two resolutions, one directing that "no further action be taken on the timetable for implementing the . . . [Task Force plan] without the specific approval of the School Committee," and the other directing that "the Springfield School System open on September 4, with the same grades and school organization as existed in June . . . ." At the direction of the school committee the superintendent of the Springfield school system notified the State Commissioner of Education of the resolutions which had been adopted.[13]

On August 2 the school committee filed in the county court its motion to vacate the final decree after rescript which had been entered on May 15, 1974. The asserted ground for the motion was that c. 636 had amended the racial imbalance law so as to eliminate the "legal basis" for the board's opinion and order which the final decree

[13] Although it does not appear on the record, we were assured by counsel at the oral arguments that the school committee subsequently rescinded those two resolutions.

purported to enforce. On the same date a group of children attending the elementary schools of Springfield and their parents moved to intervene in the case. They subsequently filed an *"Answer and Counterclaim" to the school* committee's motion to vacate. Subsequently the motion to intervene was allowed by a single justice of this court and the answer and counterclaim were received.[14] The school committee filed an answer to the counterclaim, and the case was then reserved and reported without decision. The full court heard oral argument during a special sitting on August 22 and, as noted at the outset, on the same day issued its decision denying the school committee's motion to vacate and directing compliance with the earlier final decree, deferring to a later date the filing of an opinion or opinions.

We turn now to the legal issues presented by the motion to vacate.

It is well established that a court has power to modify or change a prior decree due to a change in circumstances, including a change in the applicable law. *Sawyer* v. *Davis,* 136 Mass. 239 (1884). *State* v. *Wheeling & Belmont Bridge Co.* 18 How. 421 (1855). *System Fedn. No. 19, Ry. Employes' Dept. AFL-CIO* v. *Wright,* 364 U.S. 642 (1961). See *Nantucket Exp. Lines, Inc.* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.* 350 Mass. 173, 174-175 (1966), cert. den. 384 U.S. 952 (1966). Cf. *Royal* v. *Royal,* 324 Mass. 613 (1949). Citing this proposition, the school committee argues that the change in the racial imbalance

[14] During the argument before the full court the interveners were the only parties who opposed the motion to vacate. Although the board issued an opinion and order on August 13 in which it took the position that the motion to vacate should be denied, at oral argument and in the briefs the board was represented by members of the staff of the Attorney General who argued in support of the motion.

law accomplished by c. 636 requires that we reconsider the final decree enforcing the board's opinion and order. Because under the racial imbalance law as amended by c. 636 the measures which the board may order local school committees to adopt include only the use of portable classrooms and the construction of additions to or changes in the use of existing buildings, the school committee contends that the final decree must be vacated because the board no longer has the authority to require the implementation of the Task Force plan, which involves redistricting, transfer of students and busing.

An initial problem with this argument is that it is not clear from the language of the amending statute itself that the Legislature, by enacting c. 636, had any intention of affecting the operation of racial balance plans which had already been approved by the board and incorporated in final decrees of this court. There is certainly nothing in the wording of the 1974 amendment, taken by itself, which suggests an intention to scrap all the work that has been done in both Springfield and Boston toward ensuring that measures to eliminate racial imbalance would at long last be implemented this September. In addition, it was well known to the Legislature that the racial balance plan adopted for Boston, see *Boston III*,[15] had since been incorporated in a decree of the United States District Court, District of Massachusetts, as the necessary short-term remedy for violations of the Fourteenth Amendment to the United States Constitution which were found to have occurred in the operation of the Boston school system. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass. 1974). From the statutory language it would appear unlikely that the Legislature intended to flout that court order by amending the racial imbalance act so as to invalidate the

[15] See fn. 11, *supra*.

racial balance plan adopted for Boston. If the Legislature did not intend c. 636 to affect the operation of the racial balance plan already adopted for Boston, and since there is no suggestion in the statute that Springfield be treated differently from Boston, it could further be argued that the Legislature did not intend to affect the plan adopted for Springfield.

On the other hand, if c. 636 is viewed against the historical background described in the first part of this opinion and if it is considered with other portions of the imbalance legislation, together with all the opinions of this court, including our advisory opinions, in dealing with the imbalance statute of 1965, a persuasive argument can be made that the clear intent of that statute was to forestall, wherever possible, the immediate implementation of board-ordered racial balance plans which require redistricting or busing of students. It is well known that the board's orders requiring redistricting and involuntary transfer (i.e., busing) of students are the aspects of the attempts to enforce the racial imbalance law which have aroused the most vociferous opposition. See *Opinion of the Justices,* Mass. , (1973);[d] *Opinion of the Justices,* Mass. , (1974).[e] The most conspicuous change in the racial imbalance law which c. 636 accomplishes is the elimination of the board's power to order busing and redistricting to achieve racial balance. In these circumstances it is a likely inference that c. 636 was in fact intended to short-circuit the implementation of the board-ordered and court-ordered Task Force plan in Springfield, a plan which requires both redistricting and busing. Certainly this intent is suggested by the Governor's assertion, contained in his statement declaring c. 636 to be emergency

[d] Mass. Adv. Sh. (1973) 1027, 1032.

[e] Mass. Adv. Sh. (1974) 545, 548.

legislation, that "[i]t is essential that the provisions of this Act take effect immediately in order to permit its orderly administration during the school year which will soon commence." Although this view of the amendatory statute appears to be the more logical one, we need not so decide at this time.

In any event, regardless of legislative intent (determination of which is often an uncertain exercise), one propotion is clear: in the circumstances of this case, any action taken either by the Legislature or by the school committee of Springfield which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield's schools would constitute a violation of the Fourteenth Amendment to the United States Constitution and of arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. Thus, in so far as c. 636 was intended to forestall the implementation of the Task Force plan in Springfield, it is unconstitutional. Similarly, in so far as the school committee, in reliance on 3. 636, attempts to rescind the actions it has previously taken toward full implementation of that plan, it would be acting in an unconstitutional manner. We explain these conclusions.

By July 26, 1974, when c. 636 was enacted, the plans for elimination of the racial imbalance which had for nine years existed in five Springfield elementary schools had finally been made. Substantially every action which was necessary to the implementation of the Task Force plan had already been taken:[16] the more than thirty elementary school districts had been consolidated into six districts; pupil assignments had been completed and notification had

[16] Our source of information on the progress of implementation is the implementation schedule, as modified by the board opinion and order of February 11, 1974. The school committee has assured us that it has fully complied with said schedule.

been sent to parents; staff assignments and notification thereof had been completed; the safety and transportation plan had been completed; additional vehicles necessary for student transportation had been ordered; community education programs had been conducted. Thus, by the end of July, through the affirmative acts of the school committee, Springfield had in fact achieved a racially balanced school system. Essentially all that remained to be done was to put the students into the classrooms.

In these circumstances any attempt by the Legislature or by the school committee to rescind the present enrollment structure (all elementary schools less than forty per cent nonwhite) and return to the 1973-1974 enrollment structure (five elementary schools between 82% and 95% nonwhite) would constitute resegregation[17] of the previously imbalanced schools, and would thus be an unconstitutional act of de jure segregation.[18] See *Keyes* v. *School Dist. Number One, Denver, Colo.* 303 F. Supp. 289, 295 (D. Colo. 1969);[19] *Bradley* v. *Milliken*, 433 F. 2d 897, 904

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[17] Although "segregation" as used in the context of the Fourteenth Amendment cases is not necessarily synonymous with "racial imbalance" within the meaning of the Massachusetts statute, it seems clear in this case that the five Springfield elementary schools have been not only "racially imbalanced" but also "segregated." The percentage of nonwhite enrollment in each of those schools during the years from 1965 to 1973 is reflected in the table in fn. 6. The percentage of nonwhite enrollment throughout the Springfield school system in 1973 was less than thirty per cent. Cf. *Keyes* v. *School Dist. No. 1, Denver, Colo.* 413 U.S. 189, 195-196. (1973), reh. den. 414 U.S. 883 (1973).

[18] For a discussion of the distinction between de jure and de facto segregation, see *Springfield II*, Mass. at - (1974) (Mass. Adv. Sh. [1974] at 672-675). See also *Keyes* v. *School Dist. No. 1, Denver, Colo., supra*, at 208; *Milliken* v. *Bradley*, (1974) ([July 25, 1974] 42 U. S. L. Week 5249).

[19] For further history of the *Keyes* case see fn. 21, *post*.

(6th Cir. 1970);[20] *Oliver* v. *Kalamazoo Bd. of Educ.* 346 F. Supp. 766, 780 (W. D. Mich. 1971), affd. sub nom. *Oliver* v. *School Dist. of Kalamazoo,* 448 F. 2d 635 (6th Cir. 1971); *Martin* v. *Evansville-Vanderburgh Sch. Corp. of Evansville,* 347 F. Supp. 816, 820 (S. D. Ind. 1972).

The school committee and the Attorney General argue that the cited cases are distinguishable. In addition, they assert that, because there has never been a finding of de jure segregation in the Springfield schools (see *Springfield II* at [f]), any action taken pursuant to c. 636 cannot conceivably violate any constitutional provision because under c. 636 the State has not merely taken a neutral stance with respect to the elimination of racial imbalance, which is all that is constitutionally required in the absence of de jure segregation, but in fact has affirmatively moved to eliminate racial imbalance. When viewed in the "historical context" of the Springfield situation, however, it becomes easy to comprehend that any attempt under c. 636 to prevent the operation of the Task Force plan would constitute a significant retreat from the progress toward desegregation that has been made under the pre-amendment law. And the cases make clear that even where steps toward desegregation are made voluntarily rather than pursuant to constitutional mandate any subsequent State action which would cause a return of the preëxisting segregation would itself be an act of de jure segregation.[21] This

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[20] For further history of the *Bradley* case see fn. 24, *post.*

[f] At 674.

[21] It may be argued that, because de jure segregation involves the "*purpose* or *intent* to segregate," *Keyes* v. *School Dist. No. 1, Denver, Colo.* 413 U.S. 189, 208 (1973) (emphasis in original), any action by the school committee to repeal the Task Force plan would not be unconstitutional because it would be motivated, not by an intent to segregate, but only by an intent to avoid unpopular forced busing of students. The certain consequence of such

is especially true where, as in this case, there is a court decree ordering the implementation of such plans.

For example, *Oliver* v. *Kalamazoo Bd. of Educ.* 346 F. Supp. 766 (W. D. Mich. 1971), affd. sub nom. *Oliver* v. *School Dist. of Kalamazoo,* 448 F. 2d 635 (6th Cir. 1971), involved a school system in which five elementary schools had predominantly black enrollments while the system-wide black population was only 17.6%. The local board of education voluntarily had adopted a plan to increase racial integration throughout the school system. After an election, however, the newly elected board voted to rescind the earlier plan and to return to the former status quo. In a suit for a preliminary injunction against the board of education, the court declared that it was "not in a position to rule on whether or not the Board had a constitutional duty to adopt the . . . [voluntary integration plan] because all of the evidence isn't in." *Id.* at 779-780. The court nevertheless held that the board's vote purporting to rescind the integration plan was in violation of the Fourteenth Amendment and was void. The court enjoined the board from acting on the rescission vote and required the implementation of the integration plan. *Id.* at 782.

Similarly, *Keyes* v. *School Dist. Number One, Denver, Colo.* 303 F. Supp. 279 and 303 F. Supp. 289 (both D. Colo. 1969),[22] involved the revocation by a school board of a previously adopted plan to achieve racial balance. After years of study, the Denver school board, in 1969, adopted

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a repeal, however, would be the resegregation of the five previously imbalanced elementary schools. The school committee must be held to "intend" the certain consequences of its acts. See *Keyes* v. *School Dist. Number One, Denver, Colo.* 303 F. Supp. 279, 286 (D. Colo. 1969); 313 F. Supp. 90 (D. Colo. 1870); 445 F. 2d 990 (10th Cir. 1971); affirmed in part and modified in part, 413 U.S. 189 (1973), reh. den. 414 U.S. 883 (1973).

[22] See fn. 21.

three resolutions which had the effect of altering existing school attendance districts in such a way as to achieve greater racial balance among the city's schools. After a school board election, however, and while the school department staff was in the process of implementing the resolutions, the newly constituted school board voted to rescind the resolutions and to return to the old order. The court stated that, although the rescission of the steps taken toward achieving racial balance "was carried out in response to what was called a voter mandate, there can be no gainsaying the purpose and effect of the action as one designed to segregate." 303 F. Supp. at 285 (1969). Characterizing the attempted rescission as "a legislative act which had for its purpose restoration of the old status quo . . .," the court held that the vote rescinding the three resolutions "in and of itself was an act of de jure segregation." 303 F. Supp. at 295 (1969). A decree was entered enjoining the school board from implementing its rescission vote.[28]

In *Bradley* v. *Milliken*, 433 F. 2d 897 (6th Cir. 1970), the court declared unconstitutional a statute enacted by the Michigan Legislature which purported to require postponement of the implementation of a redistricting plan which had been adopted voluntarily by the Detroit board of education in order to reduce racial imbalance in the city's high schools. Even though there had been no finding of de jure segregation in Detroit's schools, the court

[28] Subsequently, after a full trial on the merits, the District Court reiterated its holding that the vote of rescission was itself an act of de jure segregation. 313 F. Supp. 61, 66-67 (1970). On appeal, neither the Court of Appeals, 445 F. 2d 990 (10th Cir. 1971), nor the Supreme Court, 413 U.S. 189 (1973), reached that issue. For a similar case reaching the same result, but involving a school system which was historically segregated, see *Martin* v. *Evansville-Vanderburgh Sch. Corp. of Evansville*, 347 F. Supp. 816 (S. D. Ind. 1972).

held that the statute violated the Fourteenth Amendment by impeding voluntary local efforts to achieve racial balance. *Id.* at 904.[24]

In addition to the foregoing, our conclusions in this case are buttressed by a second line of cases which focus on State action which amounts to racial discrimination. These cases spring from the decision of the Supreme Court in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

In the *Reitman* case the United States Supreme Court affirmed a decision of the Supreme Court of California (*Mulkey* v. *Reitman*, 64 Cal. 2d 529 [1966]) declaring unconstitutional an amendment to the California Constitution (Proposition 14, so called) which purported to forbid any agency of the State from interfering with the "absolute discretion" of any person to sell, lease or rent real estate "to such persons . . . as he . . . chooses." Analyzing Proposition 14 in light of its historical context and the conditions existing prior to its enactment, the California court concluded that the clear intent behind the amendment was to repeal pro tanto State laws which declared illegal private racial discrimination in real estate transactions. *Id.* at 534-535. The ultimate effect of Proposition 14, the court noted, would be significant involvement of the State in the encouragement of private discrimination. *Id.* at 542.

The United States Supreme Court approved of the California court's analysis based on " 'historical context,' " " 'immediate objective' " and " 'ultimate effect,' " and it affirmed the holding that Proposition 14 did not merely

[24] After several intervening decisions, see 438 F. 2d 945 (6th Cir. 1971), 338 F. Supp. 582 (E. D. Mich. 1971), 484 F. 2d 215 (6th Cir. 1973), this case reached the Supreme Court for resolution of a single question concerning the extent of the remedy ordered by the District Court. U.S. (1974) ([July 25, 1974] 42 U. S. L. week 5249).

put the State in a constitutionally permissible position of neutrality vis-à-vis private discrimination but in fact provided substantial State encouragement to those acts of private discrimination which the amendment purported to permit. 387 U.S. at 373-379 (1967). The court stated "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of . . . [Proposition 14], and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court." *Id.* at 378-379. The holding that Proposition 14 violated the equal protection clause of the Fourteenth Amendment was thus upheld.

Following the decision in the *Reitman* case, a three-judge Federal Court in New York declared unconstitutional a statute which purported to prohibit State education officials and appointed local school boards from ordering pupil assignments or redistricting for the purpose of achieving racial equality in school attendance.[25] *Lee* v. *Nyquist,* 318 F. Supp. 710 (W. D. N. Y. 1970), affd. without opinion, 402 U.S. 935 (1971). The court noted that, prior to the enactment of the statute in question, the State education officials "were firmly committed to a policy of eradicating *de facto* segregation in New York's public schools, and appointed education officials were actively engaged in directing plans to improve racial balance." *Id.* at 716. Such efforts had met with stubborn resistance at the local level.

[25] It is noteworthy that the court in this case struck down the challenged statute in its entirety, even though by its terms the statute did not restrict the authority or discretion of *elected* local school boards (which are in the vast majority throughout new York) to order assignments or redistricting in order to achieve racial balance.

In light of this background, the court found that the clear legislative purpose was "to turn the tables in favor of those recalcitrant local groups," (*id.* at 717) by preventing the use of certain measures designed to achieve racial balance. The ultimate impact of the challenged statute would be to slow substantially progress toward the achievement of racially balanced schools in the affected localities. Although ultimately relying on other grounds, the court concluded that, in these circumstances, a good case was made out under *Reitman* v. *Mulkey* that the statute, "by invidiously discriminating against efforts to achieve racial balance, violates the equal protection clause of the Fourteenth Amendment." *Lee* v. *Nyquist, supra,* 716.

The Justices of this court, too, have relied on the *Reitman* case as demonstrating the unconstitutionality of the legislation which purported to prohibit the use of mandatory school assignments and busing to achieve racial balance. See *Opinion of the Justices,* Mass. (1973;[g] *Opinion of the Justices,* Mass. (1974).[h] In the earlier *Opinion of the Justices* we stated that a bill which purported both to require the assignment of pupils to the schools nearest their respective homes and to bar transportation of pupils without parental written consent would, if enacted, be unconstitutional. Citing the Supreme Court's decision in *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971), we noted that "even in situations where there is only de facto segregation, if the State adopts a policy which freezes these de facto conditions by imposing severe limitations on local school officials' discretionary authority to take effective remedial action, then the State policy constitutes State action serving to continue segregation in the schools and thus 'significantly

[g] Mass. Adv. Sh. (1973) 1027.

[h] Mass. Adv. Sh. (1974) 545.

encourage[s] and involve[s] the State' in private racial discrimination. See *Reitman* v. *Mulkey,* 387 U.S. 369, 381 [1967]; *Lee v. Nyquist,* 318 F. Supp. 710, 716 [1970]." Mass. at (1973).[i]

Similarly, in the present case, it is quite clear that the school committee, although not barred by c. 636, will not voluntarily order the redistricting and busing which is integral to the Task Force plan. And from the past efforts in Springfield it is equally clear that racial balance cannot be achieved without such redistricting and busing. Thus, in this setting, by depriving the board of its power to require the use of effective measures for the elimination of racial imbalance, c. 636 is, in effect, "an authorization to discriminate." *Reitman* v. *Mulkey,* 387 U.S. at 379 (1967). If the school committee at this stage, in reliance on c. 636, attempts to rescind the implementation of the Task Force plan, it would constitute "State action serving to continue segregation in the schools and thus 'significantly . . . [involve] the State' in . . . racial discrimination." *Opinion of the Justices,* Mass. at (1973).[j]

In light of the foregoing discussion, it is clear that the school committee cannot constitutionally follow the course suggested by its resolutions of August 1, 1974, whereby it proposed to scrap the Task Force plan and return to the school structure which existed last year. When the school committee, pursuant to the orders of the board and of this court, proceeded to implement the Task Force plan, it in effect created a new status quo in which every elementary school is racially balanced. If, now that that new status quo has been substantially achieved, either the

[i] Mass. Adv. Sh. (1973) at 1031.

[j] Mass. Adv. Sh. (1973) at 1031.

school committee or the Legislature acts so as to resurrect the preëxisting school structure, the resulting racial segregation in the five elementary schools would clearly be State imposed and thus unconstitutional. Events have simply moved too far to permit such a reversion.

Since the school committee must continue to comply with the Task Force plan, as required by the final decree after rescript in the *Springfield II* case, there is no occasion to modify or vacate that decree.

QUIRICO, J. (with whom Reardon and Braucher, JJ., join, concurring in the result). I concur in the result reached in the opinion of the court, but I do so on the basis of construing the applicable statutes in a manner which does not reach or decide questions of constitutionality.

On October 12, 1973, and February 11, 1974, the State board of education (board) entered orders for the elimination or reduction of racial imbalance in certain public schools of the city of Springfield. The board entered the orders in the exercise of the authority vested in it by the then existing statutes relating to racial imbalance in the public schools. G.L. c. 15, §§ 1I-1K, and c. 71, §§ 37C-37D, originally inserted by St. 1965, c. 641. On May 1, 1974, by our opinion in *School Comm. of Springfield* v. *Board of Educ.* Mass. , , (1074),[a] we held that the orders of the board were valid and ordered that a single justice enter a final decree "affirming the board's opinion and order and requiring a timely compliance therewith." A single justice entered the required decree on May 15, 1974.

The board's order thus held valid by this court required some redistricting, with resulting transportation of a number of students by bus, for the elimination or reduction

[a] Mass. Adv. Sh. (1974) 657, 660, 676.

of existing racial imbalance. The racial imbalance statutes cited above were amended in many respects by St. 1974, c. 636, effective on July 26, 1974. Relevant to the present issue was an amendment to the effect that although the board could make recommendations to a local school committee which, in certain circumstances, would become mandatory, such recommendations and mandatory plan could "include any of the following measures, and no others . . .: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings." G.L. c. 15, § 1I, as appearing in St. 1974, c. 636, § 1.

The school committee argues in effect that because of the amendments to the racial imbalance statutes by St. 1974, c. 636, the orders of the board which were valid when entered have become unenforceable and the final decree must therefore be vacated. It states in its brief: "Chapter 636 does not vacate any court decree either expressly or in effect. However, the racial balance law has been amended by Chapter 636. The law as it stood prior to the enactment of Chapter 636 was the legal basis for the court order. That law no longer exists and therefore the court order must be changed."

I do not agree with the contention in the last sentence quoted above. The mere fact that the board's authority to approve or order a plan which involved implementation in part by redistricting and the transportation of students was repealed by St. 1974, c. 636, does not mean that its orders issued prior thereto are no longer effective or enforceable. Neither does it mean that the court's earlier decree ordering enforcement of such orders has become null and void. In my opinion this conclusion is required by the application of the following rule of statutory interpretation stated by Chief Justice Rugg in *Hanscom* v. *Malden & Melrose Gas Light Co.* 220 Mass. 1, 3 (1914):

"The general rule of interpretation is that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless all legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action." This language has been quoted with approval in numerous subsequent decisions of this court, one of the most recent being *City Council of Waltham* v. *Vinciullo,* Mass. , - (1974),[b] where we added, at ff[c] "There are, of course, limitations to the extent to which even procedural or remedial statutes will operate retroactively. At the extreme, no 'retroactive' procedural statute could apply to a case which has been closed, i.e., has gone to judgment and either been affirmed on appeal or not been appealed within the time allowed for appeal." The present case is one which has been closed by the entry of a final decree which has been affirmed by this court on appeal. Thus whether c. 636 be one affecting substantive rights or merely one relating to remedies, it has no retroactive effect in this case. *Pittsley* v. *David,* 298 Mass. 552, 554-557 (1937). *Patrick* v. *Commissioner of Correction,* 352 Mass. 666, 669 (1967).

The court states that if c. 636 is viewed and considered against the historical background and other facts described

[b] Mass. Adv. Sh. (1974) 167, 168-169.
[c] At 170.

in its opinion, "a persuasive argument can be made that the clear intent of that statute was to forestall, wherever possible, the immediate implementation of board ordered racial balance plans which require redistricting or busing of students." In my view, even if the legislative history of c. 636 indicated that the Legislature intended to nullify the preëxisting orders of the board and decrees of the court, that would not be a factor in the interpretation of the statute because the Legislature did not translate that intent into the language of c. 636. A legislative intent, regardless of how obvious it may appear from sources other than the statutory language, cannot be judicially incorporated into a statute containing clear and unequivocal language which does not reflect that intent.[1] This, of course, is not intended to be a decision that the Legislature does or does not have the power, by the use of any language, to nullify any prior lawful order of the board, particularly an order previously enforced by a decree of this court. I conclude only that, if it had that power, it did not enact a statute which is adequate to accomplish that result.

If the Legislature had the intention imputed to it by the court's opinion, the natural reading of the statute is that implementation of that intent was left to judicial application of equitable principles. We have the power to modify an equitable decree in the light of changed circumstances, and a declaration of future policy by the Legislature "is entitled to the highest consideration of the

[1] In a number of decisions we have indicated that in interpreting statutes resort may be had to the legislative history "only to aid in the solution of an ambiguity." *Allen* v. *Commissioner of Corps. & Taxn.* 272 Mass. 502, 508 (1930). *D. N. Kelley & Son, Inc.* v. *Selectmen of Fairhaven*, 294 Mass. 570, 576 (1936). *Nichols* v. *Commissioner of Corps. & Taxn.* 314 Mass. 285, 293 (1943). *Milton* v. *Metropolitan Dist. Commn.* 342 Mass. 222, 223 (1961).

court." *Sawyer* v. *Davis,* 136 Mass. 239, 247 (1884). However, it is reasonable to assume from the history of the present controversy that if the decree were vacated the school committee would revert to its past policy of questionable constitutionality which resulted in five of its elementary schools having concentrations of 82.3% to 95.1% of nonwhite pupils in 1973 (see fn. 6 of the court's opinion), and that it would take no present action to eliminate that condition. This is therefore not an appropriate case for vacating our prior decree.

It is my opinion, based on the foregoing interpretation of the racial imbalance statutes as amended by St. 1974, c. 636, that it is not necessary to consider or decide whether these statutes would be unconstitutional if interpreted as purporting to nullify the board's prior orders and the court's decrees. Ordinarily a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . . 'When the validity of an act . . . is drawn in question, an even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson,* 285 U.S. 22, 62." *Ashwander* v. *Tennessee Valley Authy.* 297 U.S. 288, 347-348 (1936) (concurring opinion of Brandeis, J.). *Burton* v. *United States,* 196 U.S. 283, 295 (1905). *United States* v. *International Union United Auto., Aircraft & Agricultural Implement Wkrs. of America (UAW-CIO),* 352 U.S. 567, 590 (1957). *First Natl. Bank* v. *Attorney Gen.* Mass. ,

(1972)[4] (concurring opinion of Quirico, J.), and cases cited therein.

ADDENDUM BY TAURO, C. J.

In view of the unequivocal attitude of Justice Quirico in the concurring opinion that the constitutional question should not have been reached, and because of the frequent recurrence of this problem as it relates to statutory construction, it is my belief that it is not only appropriate but, indeed, essential to reëxamine the history, logic, and rationale of the underlying rules. What I now state are my own views and may not necessarily reflect those of all of the Justices who joined with me in the majority opinion.

The concurring opinion would have us refrain from any consideration of the constitutionality of St. 1974, c. 636 (the amendment). Justice Quirico concludes, based on its construction, that the amendment does not interfere with or nullify the decrees in this case. Thus, he reasons, consideration of the amendment's constitutionality is "not necessary" to our decision. Because such consideration is "not necessary," the concurring opinion informs us that we may not undertake any constitutional analysis. In support of this position, the concurring opinion quotes Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authy.* 297 U.S. 288, 347 (1936): "Ordinarily a court 'will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.' "

On its face, the rule espoused by Brandeis provides for avoidance of constitutional adjudication in every situa-

[4] Mass. Adv. Sh. (1972) 1711, 1734-1736.

tion in which such avoidance is feasible. The rule appears as an inflexible, blanket prohibition against resolving constitutional issues in the absence of absolute necessity.

In this addendum, I will explore the scope of the rule. I believe that it is not without limitation, qualification and exception and that courts must adopt such exceptions in cases like the present *Springfield* case which raise questions of great public importance.[1]

The rule is a venerable one and is often repeated in opinions by courts throughout the United States. It originated in those early decisions of Chief Justice Marshall which sought to establish judicial review of legislation's constitutionality and, at the same time, to clarify the scope of the power of review. In *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), Chief Justice Marshall wrote: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.* at 404. But that jurisdiction was not boundless in Chief Marshall's view. He tempered his remarks with an important qualification regarding judicial adventure in the

[1] Because I also believe that another construction of the amendment is more "logical," I have no difficulty reaching the constitutional issues in this case. The amendment does affect the decrees and must receive constitutional attention. However, as I have stated, the Brandeis rule arises with sufficient frequency that I feel an in-depth review of the underlying law is in order at this time.

legislative sphere: "If the first question [a matter of statutory construction] be answered in the affirmative, it will become necessary to consider the second [the constitutionality of the law in question]. If it should be answered in the negative, it will be unnecessary, and consquently improper, to pursue any inquiries, which would then be merely speculative, respecting the [constitutional] power of Congress in the case." *Id.* at 441.

In Chief Justice Marshall's words, we can discern the Brandeis rule in embryo. The nonconstitutional issue receives priority of determination. If it is dispositive, the court will not reach questions of constitutionality. They then become "unnecessary" and "consequently improper."

This rule of judicial restraint, of course, achieved great currency and was liberally adopted in the opinions of the United States Supreme Court and other Federal and State courts. E.g., *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge,* 11 Pet. 420, 553 (1837); *Trade-Mark Cases,* 100 U.S. 82, 95-96 (1879); *Liverpool, N.Y. & Philadelphia S.S. Co.* v. *Commissioners of Emigration,* 113 U.S. 33, 39 (1885); *Baker* v. *Grice,* 169 U.S. 284, 292 (1898); *Burton* v. *United States,* 196 U.S. 283, 295 (1905); *Siler* v. *Louisville & Nashville R.R.* 213 U.S. 175, 193 (1909); *Massachusetts* v. *Mellon,* 262 U.S. 447, 488-489 (1923); *Alabama State Fedn. of Labor* v. *McAdory,* 325 U.S. 450, 461-462 (1945); *Poe* v. *Ullman,* 367 U.S. 497, 503-504 (1961); *Ex parte Randolph,* 2 Brock 447, 478-479 (Cir. Ct. D. Va. 1833) (opinion of Marshall, C.J.); *Hoover* v. *Wood,* 9 Ind. 286, 287 (1857); *Weimer* v. *Bunbury,* 30 Mich. 201, 218 (1874); *Elliott* v. *Oliver,* 22 Ore. 44, 48 (1892).

In adhering to the rule, the United States Supreme Court has fashioned a variety of adjudicatory devices which stand up as independent nonconstitutional grounds for de-

cision and permit decision without passing on the constitutionality of legislation or executive action. See, generally, Gunther, The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review, 64 Col. L. Rev. 1 (1964). On the merits the court will resolve a case through statutory construction tailored to constitutional requirements (*Dennis* v. *United States*, 341 U.S. 494, 501 [1951]) or through a process of severing a statutory provision which is clearly constitutional and is at issue in the litigation from the remainder of a dubious statute. *Electric Bond & Share Co.* v. *Securities & Exch. Comm'n* 303 U.S. 419 (1938). *Communist Party of the U.S.* v. *Subversive Activities Control Bd.* 367 U.S. 1, 72-73 (1961). In like manner, the court will dismiss an appeal or writ of certiorari because a State court judgment rested on an adequate State ground which precluded constitutional review (*Enterprise Irr. Dist.* v. *Farmers Mut. Canal Co.* 243 U.S. 157, 164 [1917]; *Jankovich* v. *Indiana Toll Rd. Comm.* 379 U.S. 487, 489 [1965]) and will remand cases to State courts for clarification of the foundation (State law *or* the United States Constitution) of the ruling below. *Minnesota* v. *National Tea Co.* 309 U.S. 551, 557 (1940). *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U.S. 194, 201 (1965). This arsenal of avoidance tools is supplemented by an additional array of often used doctrines such as standing, justiciability, abstention, and mootness. See, generally, Bickel, The Supreme Court 1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961).

The fact that the rule of avoidance of constitutional issues is often reiterated and variously effectuated does not in any way indicate that it is an ineluctable commandment binding on every court. Fundamental law, constitutional and statutory, does not compel refusal to adjudicate con-

stitutional issues. Though the rule is occasionally thought to have jurisdictional overtones for the Federal courts in the light of art. 3, § 2, the United States Constitution's case or controversy requirement[2] (see, e.g., *Liverpool, N. Y. & Philadelphia S.S. Co.* v. *Commissioners of Emigration,* 113 U.S. 33, 39 [1885]; *Herb.* v. *Pitcairn,* 324 U.S. 117, 125-126 [1945]; Bickel, The Supreme Court 1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 43 [1961]), the better view would seem to be that it is a prudential rule developed by the United States Supreme Court (and other courts) "for its own governance in the cases confessedly within its jurisdiction." *Ashwander* v. *Tennessee Valley Authy.* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). See *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, 568-571 (1947); *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953); *United States* v. *Raines,* 362 U.S. 17, 23 (1960); *Ex parte Randolph,* 2 Brock. 447, 478-479 (Cir. Ct. D. Va. 1833); Robertson & Kickham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland ed.) § 266, p. 485 (1951); Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for the Revised Doctrine, 1965 Sup. Ct. Rev. 187, 201. See also *Moore* v. *Election Commrs. of Cambridge,* 309 Mass. 303, 306 (1941); *Commonwealth* v. *Gilfedder,* 321 Mass. 335 (1947). Thus, the rule with which Justice Quirico would forestall our consideration of the constitutionality of the amendment exists only because a court, in its sound discretion, chooses to give it life. But matters within the discretion of a court can always be revised for good *policy* reasons. Here, then, is the most elementary limitation on the rule: When a court finds that the policy supporting the rule is overborne by

[2] "The judicial power shall extend to all cases, in law and equity, arising under this constitution . . . to controversies to which the United States shall be a party. . . ."

other considerations it may decline to follow the rule. To specify those situations in which such deviations from the rule are appropriate, I must now proceed to explore the foundations of the rule.

Two fundamental notions, arising out of a view of the proper judicial function in our society, underlie the rule of judicial avoidance of unnecessary constitutional questions. The first notion, probably the more significant, is that of comity among the branches of our tripartite government. In *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230 (1946), we commented on the court's duties under the Constitution and its relationship to the other coequal branches of government: "The power to hold statutes unconstitutional is the logical and inevitable result of the existence of law-making power at different levels of authority. . . . When . . . [a court] has to pass upon the validity of an act of a coordinate branch of government, a court exercises a grave and delicate function. A court never seeks to decide a constitutional question. It never volunteers an opinion. It remains silent and inactive until some case comes before it in which the rights of the parties depend upon the constitutional validity of a statute. . . ." Id. at 244-245. This "grave and delicate" function, a necessary concomitant of judicial independence and responsibility, inevitably must affront the legislative and executive branches when their actions are subjected to scrutiny and criticism. A proper regard for these coequal branches minimizes the likelihood of affront and, so, delimits the judicial purview in constitutional matters. As Chief Justice Marshall wrote, "[A] just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed." *Ex parte Randolph*, 2 Brock. 447, 479 (Cir. Ct. D. Va. 1833). In a government of separated powers, each branch must exhibit due deference to the others if they are

to coexist hamoniously. See *Trade-Mark Cases,* 100 U.S. 82, 95-96 (1879); *Communist Party of the U. S.* v. *Subversive Activities Control Bd.* 367 U.S. 1, 72 (1961); *Hunter* v. *Colfax Consol. Coal Co.* 175 Iowa 245, 269 (1915); *State* v. *Harrison,* 130 W. Va. 246, 249 (1947). The function becomes correspondingly graver and more delicate when decision by the Federal Courts would contain the potentiality for Federal-State conflict. To the traditional concerns invoked by the separation of powers are added the complexities and protocol of a Federal system. See *Parker* v. *County of Los Angeles,* 338 U.S. 327, 332-333 (1949); *Poe* v. *Ullman,* 367 U.S. 497, 503 (1961).

The second policy support for the rule of avoidance of constitutional decision inheres in the "very nature of the judicial process. [C]ourts can most wisely determine issues precisely defined by the confining circumstances of particular situations." *Communist Party of the U. S.* v. *Subversive Activities Control Bd., supra.* This restriction is considered especially apposite in constitutional litigation. Constitutional questions are, by their nature, intricate. Their outreach is tremendously broad. Without a secure factual mooring, constitutional decisions can generate unanticipated repercussions. Therefore, before venturing to break new constitutional ground, the courts must await optimum presentation of the issues. The absence of a constitutional question which arises *necessarily* from the fact pattern deprives the court of insights and interconnections which should illuminate the ultimate holding. The court must be able to "decide a constitutional question with confidence that relevant considerations have not been overlooked." *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 246 (1946). See *Cole* v. *Chief of Police of Fall River,* 312 Mass. 523, 526 (1942), app. dism. sub nom. *Cole* v. *Violette,* 319 U.S. 581 (1943), reh. den. 320 U.S. 810

(1943); *Alabama State Fedn. of Labor* v. *McAdory*, 325 U.S. 450, 462 (1945).

Thus, the rule of judicial restraint urged by the concurring opinion evolved because of a judicial desire to preserve amicable relations with coördinate branches of government and to assure the fullest possible consideration of constitutional questions before decision. In the mundane case, these justifications suffice to preclude judicial action on constitutional issues. However, in the extraordinary case which raises questions of the utmost public importance, this structure of restraint must fall by the wayside. In the extraordinary case, the court must exercise its discretion to hear constitutional argument. Policy considerations favoring constitutional adjudication overwhelm those which militate against immediate resolution of constitutional issues.

Generally, I would state the rule for reaching constitutional questions in spite of an alternative nonconstitutional ground as follows: this court must accept the responsibility of constitutional adjudication when (1) the constitutional issue is of overriding public concern; (2) the issue is bound to reappear and must be decided in subsequent litigation; and (3) the issues have been exhaustively briefed and argued by adverse parties. Zealous regard for the sensibilities of coördinate branches must give way before public necessity. The public has a right to judicial guidance concerning the propriety and legality of alternate courses of action in matters of great moment. This is particularly true when the issue will recur in litigation before the court. Adjudication then is not a needless affront to the Legislature. Rather, the adjudication avoids unnecessary delay, forestalls future litigation, and conserves judicial time and resources by not requiring reargument of the issues. The affront, if such it is, would occur anyway at a later date. Finally, since the adversaries under the rule which I pro-

pose have contested the issues fully, there can be no advantage in awaiting presentation of the constitutional issue in another factual context. Heated adversary argument, extensive briefing, and searching judicial scrutiny already have supplied the sharp focus which good practice demands of constitutional litigation.

In this vein, in *Commonwealth* v. *Gilfedder,* 321 Mass. 335 (1947), we elected to reach issues under the First Amendment to the United States Constitution posed by complaints charging defendants with delivering "'oration[s]'" on the Boston Common in violation of the General Rules of the Board of Park Commissioners. We declined the opportunity to rule on narrow grounds going to the sufficiency of the complaints or to a conflict between the General Rules of the Board of Park Commissioners and Revised Ordinances of Boston. Justice Qua explained our decision: "The issue of constitutionality has been fully argued. Even if we could manage to avoid deciding it now, it would certainly arise again in the near future, and additional expense would be incurred. In these circumstances it seems our duty in the interest both of the parties and of the public to deal with the fundamental [constitutional] issue which will prove decisive of all the cases." *Id.* at 338. See *Moore* v. *Election Commrs. of Cambridge,* 309 Mass. 303, 306 (1941); *School Comm. of Boston* v. *Board of Educ.* 352 Mass. 693, 697 (1967), app. dism. 389 U.S. 572 (1968); *Wachusett Regional Sch. Dist. Comm.* v. *Erickson,* 353 Mass. 77, 79 (1967).

In *Matter of Bell* v. *Waterfront Commn. of N. Y. Harbor,* 20 N.Y. 2d 54 (1967), the New York Court of Appeals reviewed a waterfront commission order which revoked the petitioner's registration as a longshoreman. The court found that the petitioner had lied to the commission while under oath and that this perjury alone amply justified re-

vocation of registration. Technically, therefore, the petitioner lacked "standing" to challenge the constitutionality of a statute which authorized disciplinary action against longshoremen engaged in subversive activity. *Id.* at 60. Nevertheless, the court examined the constitutionality of the statute. The opinion of Chief Judge Fuld echoes our sentiments in the *Gilfedder* case: "This principle [the petitioner's lack of standing] would manifestly justify our declining to pass upon the constitutional argument advanced by the petitioner. However, it is settled that judicial reluctance to decide questions which need not be reached must give way when a case raises 'important constitutional issues' and the 'controversy is of a character which is likely to recur.'" *Id.* at 61.

Similar analysis has controlled numerous cases in other jurisdictions. *Buckingham* v. *State*, 42 Del. 405, 409 (1944). *Hammond* v. *Bingham*, 83 Idaho 314, 317 (1961). *Sarlls* v. *State ex rel. Trimble*, 201 Ind. 88, 100 (1929). *Hunter* v. *Colfax Consol. Coal Co.* 175 Iowa 245, 274 (1915). *Alongi* v. *Schatzman*, 57 N.J. 564, 574 (1971). *State* v. *Conragan*, 54 R.I. 256, 259 (1934). See *In the Matter of Brown*, 439 F. 2d 47, 51 (3d Cir. 1971); *State ex rel. Bland* v. *St. John*, 244 Ala. 269, 277 (1943); *Eye Dog Foundation* v. *State Bd. of Guide Dogs for the Blind*, 67 Cal. 2d 536, 541-542 (1967); *Hardware Mut. Cas. Co.* v. *Premo*, 153 Conn. 465, 473 (1966); *Ex Parte Lewis, Petitioner*, 101 Fla. 624, 628 (1931); *Green* v. *State ex rel. Phipps*, 166 So. 2d 585, 587 (Fla. 1964); *State ex rel. Collins* v. *Jones*, 106 Miss. 522, 588 (1913); *State ex rel. West* v. *Thomas*, 62 N.M. 103, 106 (1956); *Battles* v. *State ex rel. Okla. Commn. for Crippled Children*, 206 Okla. 444, 445 (1951); *State* v. *Harrison*, 130 W. Va. 246, 249 (1947); *Eastwood* v. *Wyoming Hy. Dept.* 76 Wyo. 247 (1956).

The United States Supreme Court has not explicitly fashioned a broad policy-based exception to the Brandeis rule

of avoidance. Occasional language in opinions mentions specific exceptions or hints that the rule may not be one of universal applicability. See, e.g., *Siler* v. *Louisville & Nashville R.R.* 213 U.S. 175, 193 (1909) ("course is usually pursued"); *United States* v. *Raines,* 362 U.S. 17, 22 (1960) ("some exceptions . . . where there are weighty countervailing policies"). In cases in which the court does not adhere to the rule, it most often passes over a possible Brandeisian objection without comment. The rationale for deviation from established practice remains shadowy. Frequently, the only signal that the court has, in fact, ignored an adequate nonconstitutional gravamen is an emphatic dissent or concurrence which seeks to demonstrate the illegitimacy of the path taken. See, e.g., *Shapiro* v. *United States,* 335 U.S. 1, 37 (1948) (Frankfurter, J., dissenting); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 522-523 (1964) (Clark, J., dissenting); *Crider* v. *Zurich Ins. Co.* 380 U.S. 39, 45 (1965) (Goldberg, J., dissenting); *Powell* v. *McCormack,* 395 U.S. 486, 573 (1969) (Stewart, J., dissenting); *Benton* v. *Maryland,* 395 U.S. 784, 801 (1969) (Harlan, J., dissenting); *Wyman* v. *James,* 400 U.S. 309, 345 (1971) (Marshall, J., dissenting). It is enough for my purpose here to know that the Supreme Court practice of avoidance of constitutional issues is not an invariable one mandated by the Constitution or by statute. As the practice is discretionary and based on policy, our court may deviate from the practice whenever our experience and sound policy suggest that deviation is appropriate. That general course is the one I propose here.

That course is notably appropriate in the instant case. If there is any case containing constitutional issues of overriding importance which merit immediate judicial attention, it is this case. In recent weeks and months, the issue of school desegregation has thoroughly occupied the forefront

of public attention in the Commonwealth. It has aroused passions and engaged the interest of a broad cross section of citizens. It has sparked an acrimonious (at times, a violent) debate over educational priorities and children's destinies.

In the instant case, we have before us one attempt to shape the educational system which instructs the Commonwealth's young. The Legislature, responsive to public concern over racial imbalance solutions, has enacted an amendment which alters the array of available and necessary remedies for achieving racial balance. We have a public duty to express, promptly and categorically, our view of the amendment's constitutionality. No unrealistic hopes should be built on an unconstitutional statute. No hopes should be thwarted by an unconstitutional statute. This is our opportunity to give direction. We have properly decided these questions now and have avoided further delay.

There can be no advantage in delay. If we were to delay, we would forfeit this opportunity to give the citizens of Springfield and the officials whose responsibility it is to maintain desegregated schools in the Commonwealth an authoritative adjudication of their constitutional duties under the amended imbalance law. Their uncertainty could only generate more litigation, more confusion, more expense, and more rancor.

If there was any doubt as to the likelihood of recurrent litigation and the necessity for an immediate constitutional decision, this doubt has been dispelled. By letter of October 31, 1974, to this court, the superintendent of public schools of Springfield, writing for the Springfield school committee, reminded us that the committee is under a mandate of the State board of education to provide a phase two plan to integrate the schools of Springfield by December 2, 1974. Among the goals of the plan will be the "lessen[ing

of] the racial isolation of Puerto Rican students," a matter we specifically excluded from the decree in *School Comm. of Springfield* v. *Board of Educ.* Mass. , - (1974).[a] The superintendent expressed the belief, held by

Had we adopted the course advocated by Justice Quirico and avoided the constitutional issue, the committee would have received no notice that sections of the amendment are unconstitutional and no guidance in alleviating the isolation of the Puerto Rican students. The committee would have acted without a definitive ruling on the constitutionality of the amended racial imbalance law, a ruling which it obviously wanted and needed. In fact, the committee might have felt free to deny the Puerto Rican pupils relief from their isolation through involuntary busing.

Yet, challenge to any plan which did not bus the Puerto Rican pupils or to any other plan would be inevitable. Again, challenges would have involved more delay, more expense, and more protracted litigation which, at long last, the committee, that the committee should act under the 1974 amendment and requested "an early written decision" by this court to assist in its deliberations.[3]

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[a] Mass. Adv. Sh. (1974) 657, 669-675.

[3] "The Springfield School Committee, at its regular meeting of October 24, 1974, requested me to bring to the court's attention that the Committee must provide the State Board of Education with a long-range plan to eliminate racial imbalance in the Springfield Public Schools, by December 2, 1974.

"The Committee feels that this long-range plan, including ways to lessen the racial isolation of Puerto Rican students should be written in conformity with those provisions of Chapter 636 of the Acts of 1974 that are to be upheld by the Court.

"Because of the many variables that must be considered by the School Committee in its deliberations, an early written decision of the court's oral decision of August 22, 1974, would be greatly appreciated by the School Committee."

would require a decision on the constitutional question—if not by this court, then by a Federal court.

This delay would have been particularly unnecessary in view of the posture of this litigation before us. The issue is ripe for decision. The parties to this litigation have challenged and defended the amendment. They have fully briefed their respective positions and have argued them forcefully before this court. Future litigants or litigation, it would seem, could add little to clarify constitutional concerns or to assist our exploration of the permissible constitutional course.

Under these circumstances, refusal to decide the constitutional issues because of a *possible* statutory construction would be an abnegation of our responsibilities. In sum, resort to statutory construction was meant to be applied, when indicated, to *avoid* unnecessary and needless confrontation with the Legislature. It was not intended as a means to *evade* important constitutional issues when the facts and posture of the case clearly require their prompt resolution. Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

Appendix B.

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION.

Amendments, Article V—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendments, Article X—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendments, Article XI—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States.

Amendments, Article XIV, Section 1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS ACTS OF 1974, CHAPTER 636.

An Act amending the racial imbalance law.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 15 of the General Laws is hereby amended by striking out section 1I, as amended by section 41 of chapter 14 of the acts of 1966, and inserting in place thereof the following section:

Section 1I.

The board of education, in this section called the board, shall provide technical and other assistance in the formulation of plans to reduce or eliminate racial imbalance to be filed as provided by section thirty-seven D of chapter seventy-one, may approve such plans if they meet the requirements of said section thirty-seven D, and shall provide technical and other assistance for the implementation of approved plans and mandatory plans. If a school committee or a regional district school committee has failed to file with the board a plan within the time limit established by regulation of the board as provided by said section thirty-seven D or has filed a plan which does not meet the requirements of said section thirty-seven D, the board shall consult with and, after a public hearing, make specific recommendations for such a plan, together with an explanation of how such recommendations meet the requirements of said section thirty-seven D, to such school committee or regional district school committee, and such school committee or regional district school committee may file a revised plan in response to such recommendations; provided, however, that if the board has not approved such a plan or its revision within four months after the time limit established by such regulation of the board for its filing, the board may order

that its recommendations shall be the mandatory plan to be implemented by such school committee or regional district school committee to meet the requirements of said section thirty-seven D. Any such recommendations and any such mandatory plan may include any of the following measures, and no others, to meet the requirements of said section thirty-seven D: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings.

If, following the receipt of notification from the board that racial imbalance exists, any school committee or regional district school committee does not show progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education shall not certify the amount of state aid for such city or town or for such towns which are members of such regional school district, as required by section five of chapter seventy, and the board shall not approve any project for school construction for such city, town, or regional school district under chapter six hundred forty-five of the acts of nineteen hundred and forty-eight, as amended, and the commissioner of education may notify the commissioner of corporations and taxation and the comptroller to hold such funds as have been so certified under said section five but have not been disbursed. Thereafter, upon receipt by the board of plans acceptable to it and showing progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education may notify the commissioner of corporations and taxation and the comptroller to pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the board may approve such projects.

The board shall, notwithstanding any contrary provision of chapter six hundred forty-five of the acts of nineteen hundred and forty-eight, as amended, increase the amount of grants for schoolhouse construction to seventy-five percent of the approved cost whenever the board is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D; and the commonwealth shall, subject to appropriation and upon the approval of the board, pay to a city, town, or regional district school committee seventy-five percent of the cost of other measures, except transportation as hereinafter provided of pupils, employed by a school committee thereof or such regional district school committee to provide places for pupils for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D.

The commonwealth shall, subject to appropriation and upon the approval of the board, pay to a city, town, or regional district school committee one hundred percent of the cost of transportation of non-white pupils transferred from schools in which racial imbalance exists to schools in which racial isolation or racial balance exists and one hundred percent of the cost of transportation of white pupils transferred from schools in which racial isolation exists to schools in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D.

The board of education shall designate and administer a separate "Equal Education Improvemnt Fund" for each city, town or regional school district participating under the provisions of the act, to be known as the (name of city, town or regional school district) Fund. The Commonwealth shall, subject to appropriation, pay into such fund, five hundred dollars for each non-white pupil transferred

from a school in which racial imbalance exists to a school in which racial isolation or racial balance exists, and five hundred dollars for each white pupil transferred from a school in which racial isolation exists to a school in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance.

The board shall establish guidelines by which the school committee of a city, town, or reginal school district participating under the provisions of this act, may prepare and submit to the board for its approval, a plan(s) for a program(s) including an estimate of expenses necessary to implement such plan, to improve the quality of education in said city, town or regional school district. Upon approval of such plan or plans, the board shall designate that the amount needed for such plan be paid to the applying community from the Equal Education Improvement Fund of said city, town or regional school district.

The board may add to such funds such monies as are appropriated therefore and pursuant to regulations promulgated thereto and as requested of the Department for the purposes of voluntary transfers of students under Chapter 15, for magnet school programs, for minority teacher and administrator recruitment and salary supplementation in the public schools, and for inservice teacher training projects.

Section 2. Section 1J of said chapter 15, as inserted by section 2 of chapter 641 of the acts of 1965, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:

Within thirty days after (1) a school committee or regional district school committee declines to accept the recommendations made to it by the board of education, in this section called the board, (2) the board disapproves a re-

vised plan filed with it by a school committee or regional district school committee, or (3) the board orders that its recommendations shall be the mandatory plan to be implemented by a school committee or regional district school committee, such school committee or regional district school committee may file a petition for judicial review in the superior court for the county in which it is located or in the supreme judicial court for Suffolk county. The court may affirm such recommendations, disapproval, or order of the board and require compliance with such mandatory plan by appropriate order; or, if it finds and rules that such recommendations, disapproval, or order is (*a*) in excess of the statutory authority or jurisdiction of the board, (*b*) based upon an error of law, or (*c*) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, then it may set aside such recommendations, disapproval, or order and remand the matter to the board for further action.

SECTION 3. Section 1K of said chapter 15, as so inserted, is hereby amended by striking out, in lines 2 through 5, the words "and no individual shall be appointed to this advisory committee on racial imbalance who has been listed in any state or federal document as being a member of a communist front organization."

SECTION 4. Section 37C of chapter 71 of the General Laws, as inserted by section 1 of chapter 641 of the acts of 1965, is hereby amended by inserting, in line 6, after the word "lines", the words:—, establishing of grade levels.

SECTION 5. Said chapter 71 is hereby further amended by striking out section 37D, as most rceently amended by chapter 958 of the acts of 1971, and inserting in place thereof the following section:

Section 37D.

As used in this section, sections thirty-seven C, I, and J, sections one I through one K of chapter fifteen, and section twelve A of chapter seventy-six, the following terms shall, unless the context requires otherwise, have the following meaning:

"Racial imbalance", the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.

"Racial balance", the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are non-white.

"Racial isolation", the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

"Exempt school", a public school to which, prior to January first, nineteen hundred and seventy-four, the passing of a competitive examination was a condition of entrance; provided, however, that the school committee or regional district school committee having jurisdiction over such school shall, under the supervision of the board of education, establish and maintain an affirmative action program to recruit and assist non-white students to enter and to remain in attendance at such school.

The school committee of each city, town, and regional school district shall annually, at such time and in such form as the commissioner shall determine, submit to the commissioner statistics sufficient to enable a determination to be made of the percent of white and non-white pupils attending all public schools and attending each public school under the jurisdiction of each such committee. Whenever the board of education, in this section called the board, finds that racial imbalance exists in a public school, it shall in writing notify the school committee or regional district

school committee having jurisdiction over such school that such finding has been made.

Any non-white pupil attending any public school in which racial imbalance exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial isolation exists in such other school; and any white pupil attending any public school in which racial isolation exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial imbalance exists in such other school. If a place is available for such pupil at such other school, such school committee or regional district school committee shall, forthwith upon receipt of written notice by his parents or guardian that they intend such pupil to exercise his right to be transferred to and to attend such other school, transfer such pupil to such other school. If no place is available for such pupil at such other school, such school committee or regional district school committee shall, upon receipt of such notice, formulate and, within the time limit established by regulations of the board, file with the board a plan to provide, within the same school year for which such notice is given, a place for such pupil at such other school and shall, within such time as may be prescribed by the board, implement either such plan as approved by the board or the mandatory plan of the board to provide such place and, when such place becomes available, transfer such pupil to such other school; provided, however, that the board may temporarily or permanently excuse such school committee or regional district school committee from implementing such plan or

mandatory plan if an alternative place, satisfactory to the parents or guardian of such pupil, is available at another school to which such pupil may, as provided by this section, exercise his right to be transferred and attend, or if the board finds that there is other good cause to do so. Whenever a school committee or regional district school committee determines, in accordance with regulations of the board, that the number of places available at such other school is exceeded by the number of pupils exercising their rights to be transferred to and to attend such other school, the selection of particular pupils to be transferred to such places as are available shall be in accordance with regulations of the board, which regulations shall reasonably provide for priority for non-white pupils attending schools in which more than seventy percent of the pupils are non-white, without affecting the rights of such pupils not so selected to be transferred to and to attend such other school as provided by this section.

Any such plan so filed shall set forth in detail the proposed changes in existing school attendance districts, additions to existing school buildings, use of leased or portable facilities, changes in use of school buildings, and other measures to provide a place for such pupil at such other school. Any such plan shall take into consideration on an equal basis with reduction or elimination of racial imbalance the safety of pupils in their travelling between school and home. Any such plan may provide for voluntary cooperation by other cities, towns, or regional school districts in making facilities available or otherwise rendering assistance in implementing such plan. No change in any existing school attendance district shall be made pursuant to any such plan prior to a public hearing. Notice of the time and place of such hearing and of its subject matter shall be given by mail, postage prepaid, to the parents and guardian

of each pupil affected by the proposed change and either by publication in a newspaper of general circulation in the city, town, or regional school district within which such attendance district lies once in each of two successive weeks, the first such publication to be not less than fourteen days prior to the day of such hearing, or, if there is no such newspaper, by posting such notice in a conspicuous place in the city or town hall of such city, town, or member towns of such regional school district for a period of not less than fourteen days prior to the day of such hearing. At such hearing any person, whether entitled to notice thereof or not, may appear in person or be represented by an agent who need not be an attorney.

The board shall adopt regulations for the administration of the provisions of this section relating to, but not necessarily limited to determination of places available in schools, priorities for transfer and attendance, notification to parents and guardians of pupils of such pupils' rights to transfer and attendance, reporting and publication of places available in schools, time limits for filing of plans to provide places for pupils in schools, consolidation of such plans for filing, time limits and schedules for implementation of approved or mandatory plans to provide such places, progress reports on such implementation, and affirmative action programs.

The supreme judicial and superior courts shall have jurisdiction in equity over actions commenced by the board or by or on behalf of any pupil to enforce the provisions of this section: provided, however, that in any such action commenced by or on behalf of any pupil to enforce his right, as provided by this section, to be transferred to and to attend any school, which action is concluded in favor of such pupil, the school committee or regional district school committee having jurisdiction over such school shall be liable

to such pupil or the person commencing such action on his behalf for his costs and reasonable attorney's fees.

SECTION 6. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 7. Chapter 76 of the General Laws is hereby amended by striking out section 12A, as amended by section 1 of chapter 622 of the acts of 1968, and inserting in place thereof the following section:

Section 12A.

The school committee of any city or town or any regional district school committee may adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial imbalance, as defined in section thirty-seven D of chapter seventy-one, exists in a public school. Such plan shall tend to eliminate such racial imbalance, shall be consistent with the purposes of said section thirty-seven D, and shall include an estimate of the expenses necessary to implement such plan. Such school committee or regional district school committee shall file a copy of such plan and the vote by which it was adopted with the board of education, in this section called the board. The board shall approve or disapprove such plan within ninety days after the date of such filing. If it disapproves such plan, it shall state the reasons therefor. If it approves such plan, the board, acting through the commissioner of education and on behalf of the commonwealth, shall enter into an agreement with such school committee or regional district school committee providing that such school committee or regional district school committee shall accept for attendance at its schools non-resident children as provided by such plan and that the commonwealth shall provide financial assistance to such city, town, or regional dis-

trict school committee as provided by this section; provided, however, that such agreement may provide that such school committee or regional district school committee waives all or any part of such financial assistance. No such school committee or regional district school committee shall be required to implement any such plan unless and until it and the board have entered into such an agreement providing for the amount of financial assistance and the terms on which such assistance shall be provided.

Any child residing in any city, town, or regional school district and attending therein a public school in which such racial imbalance exists may attend a public school or a publicly authorized non-sectarian school in a city, town, or regional school district in which he does not reside if the school committee of such city or town or the committee of such regional school district has adopted and the board has approved, as provided by this section, a plan for the attendance of such non-resident children therein.

The commonwealth shall, subject to appropriation and upon certification by the board, provide financial assistance in accordance with such agreement. Such financial assistance shall include payments for: (*i*) the cost per pupil of educating each non-resident child, as approved by the board; (*ii*) the cost of transportation of each such child, as approved by the board.

The board shall provide technical and other assistance to any city, town, or regional school district in the formulation and implementation of any such plan. A school committee, regional district school committee, or the board may accept, for the purpose of implementing any such plan, gifts, grants, or contributions from any source, whether public or private. Any gift, grant, or contribution so ac-

cepted by a school committee of a city or town or a regional district school committee for such purpose shall be deposited with the treasurer of such city, town, or regional school district and held in a separate account and may be expended without further appropriation, notwithstanding the provisions of section fifty-three of chapter forty-four.

SECTION 8. Chapter 71 of the General Laws is hereby amended by inserting after section 37H the following two sections:

Section 37I.

Notwithstanding any contrary provisions of law, including, but not limited to, chapter six hundred forty-five of the acts of nineteen hundred and forty-eight, as amended, the board of education, in this section and section thirty-seven J call the board, may, subject to appropriation, make grants for the cost of providing magnet school facilities. For the purpose of this section, the term "magnet school facility" shall mean a public school or part thereof which meets such requirements as may be established by the board and attracts pupils from outside the neighborhood in which it is located for the purpose of reducing or eliminating racial imbalance or racial isolation, as defined in section thirty-seven D.

The school committee of any city or town or any regional district school committee may apply to the board for a grant to such city, town, or regional district school committee for all or part of the cost of providing a magnet school facility. Such application shall be in such form as may be prescribed by the board and shall be accompanied by such estimates and other information as the board may require. The board may approve any such application for a facility which meets such requirements and which is likely so to attract pupils so as to reduce or eliminate racial imbalance or racial isolation. The board shall notify such school com-

mittee or regional district school committee of its approval or disapproval of such application and, in the case of approval, of the estimated amount of the grant which the board will make.

After notification of approval, the board and such school committee or regional district school committee may enter into an agreement providing that such school committee or regional district school committee shall provide, within a resonable time, such magnet school facility, as approved by the board, and that the commonwealth shall pay to such city, town or regional district school committee the amount of such grant. Any such agreement shall provide that such facility shall be operated in a manner designed to achieve racial balance therein or at the public school of which such facility is a part and that, whenever such school committee or regional district school committee determines, in accordance with regulations of the board, that the number of places available at such facility or school is exceeded by the number of pupils who have applied to be transferred to and to attend such facility or school, the selection of particular pupils to be transferred to and to attend such facility or school shall be in accordance with regulations of the board, which regulations shall reasonably provide for priority for those non-white pupils who are attending or otherwise would attend a racially imbalanced school and for those white pupils who are attending or otherwise would attend a racially isolated school.

The following costs of providing a magnet school facility shall be eligible for any such grant:

(*i*) the average cost per pupil of educating each child who attends such facility or the public school of which such facility is a part, less the average cost per pupil of educating each such child at the public school which he otherwise

would have attended: provided, however, that such costs shall be determined according to a method approved by the board, and that, to the extent possible, such method shall determine the average cost per pupil of educating each such child in the grade in which he is enrolled;

(*ii*) the cost of transportation of each child attending such magnet school facility;

(*iii*) the cost of planning and construction, reconstruction, enlargement, rehabilitation, or other improvement for the magnet school facility provided, however, that no such grant shall be for more than seventy-five percent of any such cost and

(*iv*) such other costs incidental to the provision of the magnet school facility as the board may approve.

The board may adopt regulations for the administration of the provisions of this section.

Section 37J.

The board of education may, subject to appropriation, reimburse any city, town or regional district for all or part of the cost of providing magnet educational programs within the public schools. Any such reimbursement shall be made only after certification by the board that such cost actually has been incurred, that such cost is reasonable, and that such program has met such requirements.

For the purpose of this section, the term "magnet educational program" shall mean educational measures including, but not limited to, planning and special services, instruction, or treatment of children, whether at the public schools or other public or private facility or place, which meet such requirements as may be established by the board for the purpose of providing such children with racially balanced educational experiences.

The board of education may contract with any other public or private facility for the purpose of purchasing mag-

net educational programs. Any city, town or regional district wanting to join in such a program shall so request the board in writing. The board shall approve all requests that meet the requirements as may be established. Any such contracts must be approved by a majority of the board provided that such cost is reasonable.

Approved July 26, 1974.

Emergency declaration by the Governor was filed in the office of the Secretary of the Commonwealth at 3:10 P.M. on July 26, 1974.

MASSACHUSETTS GENERAL LAWS, CHAPTER 15.

SECTION 1I. [Elimination of racial imbalance; assistance in formulation of plans, effect of non-compliance; denial of state aid.]

The board of education shall provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance, made pursuant to section thirty-seven D of chapter seventy-one. Whenever the board determines that a school committee or regional school district committee has failed to file a plan in compliance with the provisions of said section, it shall consult with and make specific recommendations for a plan by such school committee or regional school district committee.

If, following the receipt of notification from the board of education that racial imbalance, as defined in section thirty-seven D of chapter seventy-one, exists, a school committee or regional school district committee does not show progress within a reasonable time in eliminating racial imbalance in its schools the commissioner of education shall not certify that amount of state aid for such city or town or for such towns which are members of such regional school districts, as required by section five of chapter seventy,

and the school building assistance commission upon receipt of notice from said board that racial imbalance exists shall not approve any project for school construction for such city, town or regional school district under chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, and the commissioner of education may notify the commissioner of corporations and taxation and the comptroller to hold such funds as have been so certified under said section five but have not been disbursed. The commissioner of education may thereafter upon receipt of a plan acceptable to the board of education notify the commissioner of corporations and taxation and the comptroller to pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the school building assistance commission upon receipt of notice from said board that a plan acceptable to it has been received may approve such projects.

The school building assistance commission shall, notwithstanding any contrary provision of chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, increase the amount of grants for schoolhouse construction to sixty-five per cent of the approved cost, whenever the board of education is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance in the school system and so notifies the school building assistance commission. Added St. 1965, ch. 641, section 2, as amended St. 1966, ch. 14, section 41, effective January 1, 1966.

SECTION 1J. [Judicial review of board's recommendations or revised plans; jurisdiction.]

Within thirty days after (1) a school committee or regional school district committee declines to accept the rec-

ommendations submitted to it by the board or (2) the board disapproves a revised plan submitted to it by a school committee or regional school district committee, said committee may file a petition for judicial review in the superior court for the county in which it is located or in the supreme judicial court for Suffolk county. The court may affirm the board's determination of the recommendations submitted by it or its determination of disapproval of a revised plan submitted to it, and order compliance with the recommendations of the board by appropriate decree, or if it finds and rules that the determination by the board is (a) in excess of the statutory authority or jurisdiction of the board, or (b) based upon an error of law, or (c) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, then it may set aside such determination by the board and remand the matter to it for further action.

The supreme judicial court and the superior court shall have jurisdiction in equity upon petition of the board of education to order funds withheld as provided in section one I for such period of time as the court may determine. Added St. 1965, ch. 641, section 2, emergency, effective August 18, 1965.

MASSACHUSETTS GENERAL LAWS, CHAPTER 71.

SECTION 37C. [Promotion of racial balance.]

It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites. Added by St. 1965, c. 641, § 1.

SECTION 37D. [Racial imbalance; statistics; plans for elimination; public hearings; reimbursement for costs; progress reports; jurisdiction.]

The school committee of each city, town and district shall, annually, at such time and in such form as the commissioner shall determine, submit statistics sufficient to enable a determination to be made of the per cent of non-white pupils in all public schools and in each school under the jurisdiction of each such committee. Whenever the state board of education finds that racial imbalance exists in a public school it shall notify in writing the school committee or regional school district committee having jurisdiction over such school that such finding has been made. The school committee shall thereupon prepare a plan to eliminate such racial imbalance and file a copy of such plan with the board. The term "racial imbalance" refers to a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school.

Said plan shall detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance. Said plan shall also include projections of the expected racial composition of all public schools. Any plan to detail changes in existing school attendance districts, the locations of proposed new school sites and proposed additions to existing school buildings with the intention of reducing or eliminating racial imbalance, must take into consideration on an equal basis with the above-mentioned intention, the safety

of the children involved in travelling from home to school and school to home. Said plan may provide for voluntary cooperation by other cities and towns in rendering assistance and in making available facilities to effectuate said plan.

A school committee shall not alter or change a school district or districts under such a plan without holding a public hearing. Said school committee shall cause the notice of the time and place of such hearing and of the subject matter, sufficient for identification, to be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing or if there is no such newspaper in such city or town then by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing, and also send notice by mail, postage prepaid, to each parent affected by the proposed change. At the hearing any person, whether entitled to notice thereof or not, may appear in person or be represented by an agent who need not be an attorney.

No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee.

Whenever a city, town or regional school district provides transportation for children who live more than one and one half miles from the schools to which they are assigned for the purpose of eliminating or reducing racial imbalance, the state treasurer shall annually on or before November twentieth pay to such city, town and member towns of a regional school district, subject to appropriation,

one hundred per cent of said cost as approved by the commissioner.

Said board may, from time to time, require each school committee to submit to said board a report on the progress of the plan and its implementation.

The supreme judicial court and the superior court shall have jurisdiction in equity upon petition of the board of education to enforce the provisions of this section. Amended by St. 1969, ch. 644; St. 1971, ch. 958, Section 1.

MASSACHUSETTS GENERAL LAWS, CHAPTER 76.

SECTION 12A. [Plan for attendance in public school to eliminate racial imbalance; adoption; financial and technical assistance.]

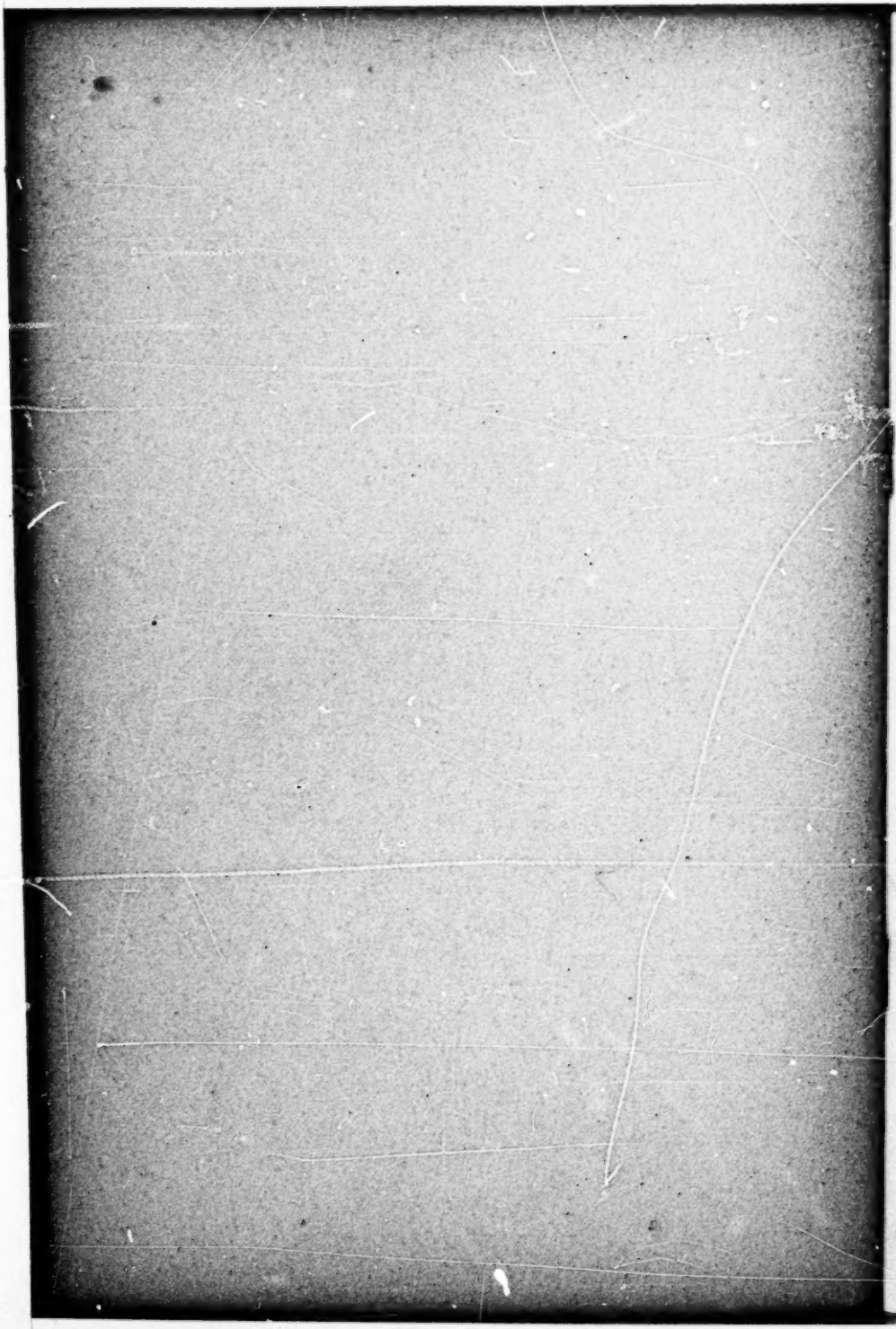
The school committee of any town may adopt a plan for attendance in the public schools in such town of a limited number of children residing in other towns in which racial imbalance, as defined in section thirty-seven D of chapter seventy-one, exists in a public school. Such plan shall tend to eliminate said racial imbalance shall be consistent with the objectives of said section thirty-seven D, and shall include an estimate of the expenses necessary to put such plan in operation. The school committee shall file a copy of such plan and the vote by which it was adopted with the state board of education. The state board of education shall approve or disapprove such plan within ninety days after the date of such filing. If it disapproves such plan, it shall state the reasons therefor; if it approves such plan, it shall inform the town of the amount of financial assistance which the commonwealth shall provide, as hereinafter provided. The town shall not be required to proceed with such plan unless and until the school committee agrees with the state board of education, through the commissioner of education,

on the amount of such financial assistance and the terms upon which such financial assistance shall be provided. A school committee and board of education may accept, for the purpose of carrying out such plan, gifts, grants, or contributions from any source, whether public or private.

Any child residing in any town and attending therein a public school in which racial imbalance, as defined in said section thirty-seven D, exists, may attend a public school of a town in which he does not reside, providing the school committee of such town has adopted, and the state board of education has approved, a plan for the attendance of nonresident children in such town, as set forth in this section.

The state board of education, from funds appropriated for the purpose, shall provide financial assistance to any town which adopts a plan for the elimination of racial imbalance in other towns, which plan meets the approval of the state board of education. Such financial assistance may include payments of part or all of the tuition required for any child, payment for part or all of the transportation costs for such child and payment for all of the salaries of teachers and others who may be required under such plan. The state board of education shall provide technical and other assistance to any town in the formulation and execution of any such plan.

Any amounts received by the school committee of any town from the federal government, from the commonwealth or from a charitable foundation or private institution for the purposes of this section shall be deposited with the treasurer of such town and held as a separate account, and may be expended by said school committee without further appropriation, notwithstanding the provisions of section fifty-three of chapter forty-four. Added by St. 1966, c. 506. Amended by St. 1968, c. 622, § 1.



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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-994

SCHOOL COMMITTEE OF SPRINGFIELD,
PETITIONER,

v.

BOARD OF EDUCATION et al.,
RESPONDENTS.

BRIEF OF RESPONDENTS AUTUMN BRUCE ET AL. (INTERVENERS) IN OPPOSITION TO CERTIORARI

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OCTOBER TERM, 1974

No. 74-994

SCHOOL COMMITTEE OF SPRINGFIELD,
PETITIONER,

v.

BOARD OF EDUCATION et al.,
RESPONDENTS.

BRIEF OF RESPONDENTS AUTUMN BRUCE ET AL. (INTERVENERS) IN OPPOSITION TO CERTIORARI

This brief is filed in behalf of Autumn Bruce and Marlece Bruce, p/p/a Susann Bruce, Kate H. Crampton, and Gregory E. Crampton, p/p/a Rebekah J. Crampton, Rusherna L. Dumpson, p/p/a Marjorie Dumpson, Susan C. Resnick, and David C. Resnick, p/p/a Barbara Resnick, Charles A. Peters, p/p/a Ronald A. Peters, Susann Bruce, Rebekah J. Crampton, Marjorie Dumpson, Barbara Resnick, and Ronald A. Peters, who are children attending elementary schools in Springfield and their parents. They

were allowed to intervene in this case by the Supreme Judicial Court of Massachusetts in opposition to petitioner's motion to vacate the final decree.

Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts of November 12, 1974, is reported at 319 N.E.2d 427, Mass. Adv. Sh. (1974) 2031. The prior opinion of that court of May 1, 1974, is reported at 311 N.E.2d 69, Mass. Adv. Sh. (1974) 657. An Opinion and Order of the Massachusetts Board of Education dated October 12, 1973 was the basis for this judicial proceeding (opinion below, Petitioner's Appendix p. 6). A subsequent Opinion and Order of the Board was issued in response to Petitioner's Motion to Vacate on August 13, 1974, and is part of the record in this case (opinion below, Pet. App. p. 11, n. 14). Of the foregoing opinions only the Supreme Judicial Court opinion of November 12, 1974, appears in the Appendix to the Petition for Certiorari.

Jurisdiction

The judgment of the Supreme Judicial Court of Massachusetts sought to be reviewed here is an order entered August 22, 1974, denying petitioner's motion to vacate final decree. As indicated in Part I of the Argument in this brief, the petition for certiorari was not filed within ninety days thereafter as required by 28 U.S.C. § 2101 (c).

Questions Presented

1. Whether the filing of the petition for certiorari was timely.

2. Whether this court should review the decision of a state court holding a state statute invalid under both federal and state constitutions.

3. Whether any provision of the United States Constitution requires a state court to vacate its otherwise valid prior final decree, where:

(a) the prior decree affirmed the order of a state administrative agency directed to a local school committee, thereby enforcing a state statutory policy of racially integrating public schools:

(b) after the date of the prior decree a legislative amendment deprived the administrative agency of some of the powers it had exercised in the original order;

(c) the local school committee, immediately upon adoption of the legislative amendment, voted to return to a racially imbalanced school attendance plan; and

(d) the state court concluded that the implementation of that vote would resegregate a school system which had achieved racial balance under the prior decree.

Constitutional and Statutory Provisions Involved

The Massachusetts Racial Imbalance Law as it existed prior to July 26, 1974, appears in General Laws, Chapter 15, §§ 1I, 1J, and 1K, Chapter 71, §§ 37C and 37D, and Chapter 76, § 12A, which are set forth in Petitioner's Appendix, pp. 58-64, except c. 15 § 1K which is not relevant here.

Chapter 636 of the Massachusetts Acts of 1974, amending the Racial Imbalance Law, is set forth in Petitioner's Appendix, pp. 44-58.

Appendix F hereto sets forth the following:

(1) Declaration of Rights of the Massachusetts Consitution, Articles 1 and 10, *infra* pp. 19-20;

(2) Massachusetts General Laws, Chapter 211, §§ 8 and 9, *infra* p. 20; and

(3) 28 U.S.C. §§ 1257 and 2101 (c), *infra* p. 21.

Statement of the Case

In 1965 Massachusetts adopted a Racial Imbalance Law designed to eliminate racial imbalance in the public schools of the Commonwealth. This statute required local school committees in communities with racially imbalanced (more than 50% nonwhite) public schools as determined in an annual census to devise plans to eliminate such imbalance (Mass. Gen. Laws, Ch. 71, § 37D, Pet. App. pp. 61-63). The State Board of Education was given various powers to review such local plans and to enforce the policy of the statute (Mass. Gen. Laws, Ch. 15, § 1I-1J, Ch. 71, § 37C, Pet. App. pp. 58-63).

In the first racial census in 1965 Springfield had six racially imbalanced elementary schools of which five remained continuously imbalanced to June 1974 (opinion below, Pet. App. p. 4).

In the judicial review of an order of the State Board in 1972 the Supreme Judicial Court of Massachusetts ordered the School Committee of Springfield (petitioner here) to adopt short-term measures to racially balance all Springfield schools by September 1973. *School Committee of Springfield* v. *Board of Education,* Mass. Adv. Sh. (1972) 1543, 287 N.E.2d 438. No such plan was adopted or put into effect by the petitioner (opinion below, Pet. App. pp. 5-6).

As a result administrative proceedings before the Board of Education in the summer of 1973 led to the Board's Opinion and Order of October 12, 1973, directing the petitioner to implement a "Task Force" plan for the short term racial balancing of the Springfield schools starting in September 1974 (opinion below, Pet. App. p. 6). The petitioner sought judicial review of this Opinion and Order, resulting in a final decree of May 15, 1974, ordering compliance with the State Board order (opinion

below, Pet. App. pp. 7-8, copy of final decree is Appendix A of this brief).

On July 26, 1974, an amendment to the Racial Imbalance Act, Chapter 636 of the Acts of 1974, was approved by the governor and was made effective immediately (Pet. App. pp. 44-58, opinion below, Pet. App. p. 8). This amendment made the following substantial changes, *inter alia,* in the Racial Imbalance Act:

(1) Local school boards were no longer required to devise plans to eliminate racial imbalance, but merely to provide for the transfer of students whose parents requested a transfer, in the case of white students to a predominantly nonwhite school, and in the case of nonwhite students to a predominantly white school (§ 5, amending G.L. c. 71, § 37D, Pet. App. pp. 48-53, opinion below, Pet. App. pp. 8-9).

(2) The State Board of Education was deprived of its power to order redistricting or transportation as part of a racial balance plan (§ 1, amending G.L. c. 15, § 1I, Pet. App. pp. 44-47, opinion below Pet. App. p. 10).

On August 1, 1974, the petitioner held a meeting at which it voted to direct its staff to take no further action to implement the Task Force plan without the specific approval of the School Committee. It also voted to reopen the Springfield schools on September 4, 1974, with the same grade structure and school organization as existed in June 1974 (opinion below, Pet. Ap. p. 10). These votes were inconsistent with the implementation schedule previously decreed by the Supreme Judicial Court and with the Task Force plan itself, which required a change in the grade structure of every elementary school (opinion below, Pet. App. p. 6, n. 8).

On August 2, 1974, the petitioner filed a motion to vacate the final decree after rescript (opinion below, Pet. App. pp. 10-11, see Appendix B of this brief). The under-

signed petitioned to intervene. A single justice of the Supreme Judicial Court admitted the undersigned as interveners and reserved and reported the motion to vacate to the full court (opinion below, Pet. App. p. 11 and n. 14). After oral argument, the Supreme Judicial Court entered its order on August 22, 1974, denying petitioner's motion (opinion below, Pet. App. p. 11, see also Appendix C of this brief). The court's opinion was issued November 12, 1974.

Argument

I. The Petition for Certiorari Was Not Filed Within Ninety Days After the Judgment Sought To Be Reviewed.

The petitioner seeks review of the denial of its motion to vacate a final decree. Appended hereto are copies of the decree (Appendix A, *infra* p. 14), motion to vacate (Appendix B, *infra* p. 15), order denying motion to vacate (Appendix C, *infra* p. 16), rescript (Appendix D, *infra* p. 17), and docket entries in the full court (Appendix E, *infra* p. 18). It is clear that the order or judgment was entered August 22, 1974, and that no subsequent order or judgment has been entered.

The ninety day period for filing this petition expired on November 20, 1974, well before actual filing on February 10, 1975. This period cannot be measured from the date of the opinion of November 12, 1974, since the opinion contains no order or judgment but rather refers to the prior entry of such order on August 22, 1974 (opinion below, Pet. App. pp. 2, 11). Massachusetts law recognizes the difference between the order or judgment of the Supreme Judicial Court and the opinion, which is not necessarily issued simultaneously. Mass. General Laws,

chapter 211, §§ 8 and 9 (Appendix F hereto). A rescript can include a final judgment for purposes of this court's jurisdiction, *Cole* v. *Violette*, 319 U.S. 581 (1943), but in this case the rescript (Appendix D hereto) manifestly does not contain any order or judgment.

A state court's judgment is final and reviewable when it ends the litigation by fully determining the rights of the parties. *Dept. of Banking* v. *Pink*, 317 U.S. 264, 267 (1942). Judgment is final when it is not subject to further review by a state court. *Ibid* p. 268. The time for filing in this court runs from the date of the appellate court's *order. Ibid* p. 268.

Market Street R. Co. v. *Comm'n*, 324 U.S. 548, 551-552 (1945) holds that judgment is final when the issues are adjudged, litigation determined, the case decided. In the case at bar this happened on August 22, 1974. By the time the opinion was written, the order was being implemented as a final judgment, Springfield schools having opened in September under the Task Force Plan (opinion below, Pet. App. p. 2, n. 3).

The statutory requirement of 28 U.S.C. § 2101 (c) that a petition for certiorari be filed within ninety days of entry of judgment or decree does not mean within ninety days of the appellate court's opinion but rather within ninety days of the entry of the judgment or order. *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969). This court's jurisdiction under 28 U.S.C. § 1257 is to review final judgments or decrees of state courts, not their opinions.

II. The Judgment Below Rests on an Adequate Non-Federal Ground.

The majority opinion of the Supreme Judicial Court based its denial of petitioner's motion on the equal protection clause of the Fourteenth Amendment and on ar-

ticles 1 and 10 of the Declaration of Rights of the Massachusetts Constitution:

> "[I]n the circumstances of this case, any action taken by either the Legislature or by the school committee of Springfield which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield's schools would constitute a violation of the Fourteenth Amendment to the United States Constitution *and of arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution.*" (Pet. App. pp. 14 and 15) (Emphasis added).

It is therefore clear that the invalidity of the relief sought under the Massachusetts Constitution is an independent and sufficient basis for the order of the court below.

It is well settled that this court does not have jurisdiction to review judgments of state courts which rest on independent and adequate state grounds. Where, as here, the judgment is based on both federal and state constitutional grounds, it will not be reviewed by this court. *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U.S. 487, 489-492 (1965); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935). The independent state ground is at least as clearly set forth in the opinion below as in that of the Supreme Court of Indiana in *Jankovich,* 244 Ind. 574 (1963).

Even if there were some ambiguity as to the ground of the decision below, it would be the practice of this court not to review the judgment. *Buck* v. *California,* 343 U.S. 99, 103 (1952) and cases there cited; *Durley* v. *Mayo,* 351 U.S. 277 (1956).

It should be noted that the Massachusetts court has held that the guaranties in its State constitution are *at least* as great as those of the equal protection clause

of the Fourteenth Amendment. *Opinion of the Justices*, Mass. Adv. Sh. (1973) 1027, 1036, 298 N.E.2d 840, 846; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 320 (1933). It is therefore clear that the State constitution may mandate racial desegregation even where the Fourteenth Amendment does not.

The majority opinion also casts doubt on whether the amendment to the statute was intended to affect existing final decrees (Pet. App. pp. 12-13). There is no reason to believe that the majority of the court would have construed the amendment as requiring vacation of prior final judgments if they had not reached the state and federal constitutional issues. Three judges, in a concurring opinion, do avoid the constitutional questions and construe the statute as not intended to have retroactive effect in this case (Pet. App. p. 25). Such statutory construction constitutes no error of federal law argued by the petitioner either below or in its petition for certiorari. Similarly the general rule that a court of equity may modify a final decree in the light of changed circumstances including a change in statutory law does not mean that it is *required* to make a particular change demanded by a party in a case where the court finds it inequitable to do so, as the concurring judges find here (Pet. App. pp. 26-27.) No rule of federal law have has been called to this court's attention which would require this discretionary power to be exercised in favor of this petitioner in these circumstances. Thus the judgment below must stand, either on the basis of the state constitution, statutory construction, or general equity principles.

III. The Judgment Below Is Clearly Correct.

The Supreme Judicial Court properly found that, in the circumstances present here, a return by the school committee to its former segregated system would constitute

state action deliberately fostering segregation. Although the petitioner reasserts throughout the petition that the public schools of Springfield have never been found to be *de jure* segregated, this contention cannot stand in the light of the opinion below, which obviously rests upon such a finding.

By July 1974 the petitioner had taken steps to implement the court ordered racial balance plan. A preliminary injunction of February 20, 1974, had made an implementation schedule applicable to petitioner (opinion below, Pet. App. p. 7). After final decree, a single justice retained jurisdiction to ensure implementation. (*ibid* p. 8). Implementation proceeded until the beginning of August (*ibid* p. 8). The votes of the petitioner of August 1, 1974, were in effect an attempted rescission of the existing integration plan. The court below said:

> "[I]n so far as the school committee, in reliance on c. 636, attempts to rescind the action it has previously taken toward full implementation of that plan, it would be acting in an unconstitutional manner. We explain these conclusions.
>
> "By July 26, 1974, when c. 636 was enacted, the plans for elimination of the racial imbalance which had for nine years existed in five Springfield elementary schools had finally been made. Substantially every action which was necessary to the implementation of the Task Force plan had already been taken: the more than thirty elementary school districts had been consolidated into six districts; pupil assignments had been completed and notification had been sent to parents; staff assignments and notification thereof had been completed; the safety and transportation plan had been completed; additional vehicles necessary for student transportation had been ordered;

community education programs had been conducted. Thus, by the end of July, through the affirmative acts of the school commitee, Springfield had in fact achieved a racially balanced school system. Essentially all that remained to be done was to put the students into the classrooms.

"In these circumstances any attempt by the Legislature or by the school committee to rescind the present enrollment structure (all elementary schools less than forty per cent nonwhite) and return to the 1973-1974 enrollment structure (five elementary schools between 82% and 95% nonwhite) would constitute resegregation of the previously imbalanced schools, and would thus be an unconstitutional act of de jure segregation." (citations and footnotes omitted) (Pet. App. pp. 14-16).

All prior cases dealing with rescission of racial balancing plans have held the rescission to be an element in finding *de jure* segregation in violation of the Fourteenth Amendment.

Keyes v. *School District Number One, Denver, Colo.*, 303 F. Supp. 289, 295 (D. Colo. 1969)

Bradley v. *Milliken*, 433 F.2d 897, 904 (CA-6, 1970)

Oliver v. *Kalamazoo Bd. of Educ.*, 346 F. Supp. 766, 780 (W.D. Mich. S.D. 1970)

Martin v. *Evansville-Vandenbergh Sch. Corp. of Evansville*, 347 F. Supp. 816, 820 (S.D. Ind. 1972)

Brinkman v. *Gilligan* (S.D. Ohio E.D. #72-137, Feb. 7, 1973)

None of these findings has been disturbed on appeal. See *Keyes*, 413 U.S. 189 (1973), *Oliver*, 448 F.2d 635 (CA-6, 1971), *Brinkman*, 503 F.2d 684 (CA-7, 1974). See also *NAACP* v. *Lansing Board of Education*, 485 F.2d 569 (C.A.-6, 1973).

This court in reviewing *Bradley* upheld the court of appeals' finding that the legislative repeal of a voluntary desegregation plan contributed to increasing segregation. *Milliken* v. *Bradley*, 418 U.S. 717, 738 n. 18 (1974).

In *Keyes* this court likewise relied on findings of *de jure* segregation which (as to two schools) were based entirely on rescission of a voluntary desegregation plan, 413 U.S. at 192, 199 n. 10.

The judgment below is further supported by those cases which have applied the "immediate objective," "ultimate effect," and "historical context" considerations of *Reitman* v. *Mulkey*, 387 U.S. 369, 373, 378-79, 381 (1967) to anti-busing legislation. In *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D. N.Y. 1970) a three judge federal court held invalid a state statute which limited the authority of appointed local school boards to order racial balancing plans, applying *Reitman*. This court summarily affirmed, 402 U.S. 935. *Reitman* and *Lee* were relied on by the Supreme Court of California in *San Francisco Unified School Dist.* v. *Johnson*, 3 Cal. 3d 937, 958-959 (1971).

In the case at bar, Springfield had at least five segregated elementary schools continuously for ten years. The petitioner's votes of August 1, 1974, in violation of a final decree of the state's highest court evidenced an unquestionable intent to return, as soon as legislation permitted it, to the historic pattern of segregation. This action and the legislation authorizing it constitute state action amounting to racial discrimination.

Prior reported cases provided all the information necessary to find the required elements of *Reitman* in the case at bar, based on the recalcitrance of local school committees to implement the Racial Imbalance Law and the interest of the Legislature in weakening it. These include two Springfield cases (opinion below, Pet. App. p. 2, n. 4), three Boston cases (opinion below, Pet. App. p. 8, n. 11),

two advisory opinions on proposed crippling amendments to the Racial Imbalance Law (*ibid*), and an early challenge to the constitutionality of the law, *School Committee of Boston* v. *Board of Education,* 352 Mass. 693 (1967), appeal dismissed 389 U.S. 572 (1968). While Chapter 636 was pending in the legislature, a United States District Court ordered the Boston school committee to desegregate its schools. *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass. 1974), affirmed —— F.2d —— (CA-1, 1974). Springfield's history of segregation before the adoption of the Racial Imbalance Law may be found in *Barksdale* v. *Springfield School Committee,* 237 F. Supp. 543, 545-546 (D. Mass. 1965), judgment vacated *sub nom. Springfield School Committee* v. *Barksdale,* 348 F.2d 261 (CA-1, 1965).

Thus, applying either the cases involving rescission of desegregation plans or those following the *Reitman* analysis, the decision below was amply warranted and indeed required. No contrary authority has been produced by the petitioner.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.

Respectfully submitted,

GERALD R. HEGARTY,
Counsel for Autumn Bruce et al., Respondents (Interveners below)

Of Counsel:
WILLIAM F. MALLOY
ROBERT D. FLEISCHNER

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. No. 73-214 Equity

SCHOOL COMMITTEE OF THE CITY OF SPRINGFIELD

v.

THE BOARD OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS

FINAL DECREE AFTER RESCRIPT

This case came on to be further heard at this sitting following the rescript of the Supreme Judicial Court and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1. That the "Petition for Declaratory Judgment, Injunctive Relief and Judicial Review" brought by the petitioner School Committee of Springfield be and hereby is dismissed.

2. That the counterclaim brought by the Board of Education is granted in that the Opinion and Order of the Board is affirmed and the Committee is ordered to make timely compliance with that Opinion and Order and the schedule for implementation of the Task Force plan.

By the Court (BRAUCHER, J.)

(s) JOHN E. POWERS, *Clerk*

Entered: May 15, 1974

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. No. 73-214 Equity

SCHOOL COMMITTEE OF THE CITY OF SPRINGFIELD
v.
THE BOARD OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS

MOTION TO VACATE

The Springfield School Committee moves to vacate the order entered on May 15, 1974 by this Court that the School Committee of the City of Springfield make timely compliance with the Opinion and Order of the Board of Education of the Commonwealth of Massachusetts and the schedule for implementation of the Task Force Plan. On July 26, 1974, Chapter 636 of the Acts of 1974 was enacted into law. Chapter 636 amends Chapter 15, Chapter 71 and Chapter 76 of the Massachusetts General Laws, which Chapters are the legal basis and legal authority for said order of this Court and for said Opinion and Order.

Wherefore, the School Committee of the City of Springfield moves that this case be ordered remanded to the Board of Education of the Commonwealth of Massachusetts and that the parties be ordered to comply forthwith with the said Chapter 636.

SCHOOL COMMITTEE OF THE
CITY OF SPRINGFIELD
By _____
WILLIAM C. FLANAGAN
City Solicitor

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. No. 43

SCHOOL COMMITTEE OF THE CITY OF SPRINGFIELD
v.
THE BOARD OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS
(and intervenor).

ORDER.

The Springfield School Committee's motion to vacate the order dated May 15, 1974, entered after rescript, is denied; all orders and decrees entered in this case by the Court or any Justice thereof remain in full force and effect. The opinion, or opinions, of the Court will follow.

(By the Court)

(s) WILLIAM M. CLORAN
WILLIAM M. CLORAN
Assistant Clerk.

August 22, 1974.

APPENDIX D

Rescript

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

At Boston, November 12, 1974.

IN THE CASE OF

SCHOOL COMMITTEE OF SPRINGFIELD

v.

BOARD OF EDUCATION & others

pending in the Supreme Judicial Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

See order entered on August 22, 1974.

BY THE COURT,
FREDERICK J. QUINLAN, Clerk.

November 12, 1974.

Brief statement of the grounds and reasons of the decision: See opinion on file.

A true copy,
Attest:
(s) FREDERICK J. QUINLAN, Clerk.

APPENDIX E

Supreme Judicial Court Docket Entries
In The Full Court

Civil No. 43

SCHOOL COMMITTEE OF THE CITY OF SPRINGFIELD
v.
THE BOARD OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS

Counsel for Plaintiff
William C. Flanagan, City Sol.
Thomas A. Kenefick, III
Counsel for Defendant
Harvey F. Rowe, Jr., A.A.G.
For Intervener:
Gerald R. Hegarty
William F. Malloy
Robert D. Fleischner

SJC	Entered August 19, 1974
Suffolk	
County	Argued August 22, 1974
Reservation	August 22, 1974. Order of the Court.
and	November 12, 1974. See order entered on
Report	August 22, 1974.
	Rescript November 12, 1974.
	Reasons as on file.
	Notice sent to counsel.

APPENDIX F

Constitutional and Statutory Provisions

(1) DECLARATION OF RIGHTS OF THE MASSACHUSETTS CONSTITUTION; ARTICLES 1 and 10

ARTICLE 1:

All men are born free and equal and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

ARTICLE 10:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by

a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

(2) MASSACHUSETTS GENERAL LAWS, CHAPTER 211, §§ 8 and 9

§ 8. Judgment or Rescript after Decision.

The full court shall, as soon as may be after the decision of the questions submitted to it, make and enter a proper order, direction or judgment for the further disposition of the case, or cause a rescript, containing a brief statement of the grounds and reasons of the decision, to be filed therein; it may remand the record to the trial court to carry such judgment into effect, or instead thereof, the full court may order a new trial or further proceedings at the bar of the supreme judicial court, or order sentence to be awarded or execution issued in said court.

§ 9. Contents of Rescripts, etc.

The records and rescripts which are made after the decision of questions of law shall contain a brief statement of the reasons therefor; and if no further opinion is written within sixty days, the reporter shall publish the case with the opinion contained in such record or rescript.

(3) TITLE 28, UNITED STATES CODE, §§ 1257 and 2101(c)

§ 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 2101 (c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

SUPREME COURT, U. S.

FILED

APR 10 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-994

SCHOOL COMMITTEE OF SPRINGFIELD,
PETITIONER,

v.

BOARD OF EDUCATION et al.,
RESPONDENTS.

BRIEF OF RESPONDENTS BOARD OF EDUCATION ET AL. IN OPPOSITION TO CERTIORARI

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RESPONDENTS.

BRIEF OF RESPONDENTS BOARD OF EDUCATION ET AL. IN OPPOSITION TO CERTIORARI

Respondents Massachusetts Board of Education and Commissioner of Education (hereinafter collectively called "Board") file this brief in opposition to the Petition for Certiorari. Under the provisions of the Massachusetts Racial Imbalance Law prior to its amendment in July, 1974, the Board was specifically charged with requiring local school committees to eliminate racial imbalance in public schools. Mass. Gen. Laws, ch. 15, § 1 I-K; ch. 71, § 37 C-D. The Board is also charged with requiring school

committees to comply with laws pertaining to public education. Mass. Gen. Laws, ch. 15, § 1G. The Springfield School Committee, Petitioner herein, was ordered by the Board to implement a plan that would eliminate racial imbalance in the Springfield public schools. This Board order was affirmed and ordered enforced by a decree of the Supreme Judicial Court of Massachusetts. The petition for certiorari is taken from the action of the Supreme Judicial Court denying petitioner's motion to vacate that decree. The Respondent Intervenor below has also filed a brief in opposition to the petition.

Opinions Below

The opinion of the Supreme Judicial Court at issue here is *School Committee of Springfield* v. *Board of Education, (Springfield III)* Mass. Adv. Sh. (1974) 2031, 319 N.E.2d 427, and is contained in Petitioner's Appendix. That opinion was the last of a long series of court and administrative decisions described below.

After the *Springfield I* decision of the Supreme Judicial Court, Mass. Adv. Sh. (1972) 1543, 287 N.E. 2d 438, the Board on October 12, 1973 issued an administrative order requiring Petitioner to implement a racial balance plan (Pet. App. p. 6).

In the *Springfield II* decision the Court affirmed and ordered enforced this administrative order. Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69. Following an amendment of the Racial Imbalance Law, Petitioner moved to vacate the decree entered in *Springfield II*. On August 13, 1974 the Board issued an opinion and order opposing the motion to vacate. Pet. App. p. 11 n. 14. The Supreme Judicial Court denied the motion to vacate for the reasons stated in the *Springfield III* opinion.

Jurisdiction

As stated in section I of the Argument, the petition for certiorari was not filed within ninety days of the judgment or decree of the Supreme Judicial Court, which was entered on August 22, 1974, and so does not meet the requirements of 28 U.S.C. § 2101 (c).

Questions Presented

1. Whether the filing of the petition for certiorari was timely.
2. Whether review should be granted where the state court decision is adequately and expressly based on state constitutional grounds as well as federal constitutional grounds.
3. Whether the state court erred in holding that actions taken by a school committee to reinstitute segregation that had been virtually eliminated in schools violated the Fourteenth Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved

The federal law provisions involved are the Fourteenth Amendment to the United States Constitution and 28 U.S.C. §§ 1257 and 2101 (c).

The state constitutional provisions are Articles I and X of the Declaration of Rights of the Massachusetts Constitution. (Respondent Intervenor's Appendix F, pp. 19-20).

The state statutory provisions involved are:

(1) The Massachusetts Racial Imbalance Law prior to amendment of July 26, 1974, which appears at Mass. Gen. Laws ch. 15, §§ II, 1J, 1K; ch. 71, §§ 37C and 37D; and

ch. 76, § 12A, all set forth in Pet. App. pp. 58-64, except for ch. 15, § 1K, not relevant here;

(2) The July 26, 1974 amendment to the Racial Imbalance Law, Mass. St. 1974, ch. 636, set forth in Pet. App. pp. 44-58;

(3) Mass. Gen. Laws ch. 211, §§ 8 and 9, set forth in Respondent Intervenor's App. F, p. 20.

Statement of the Case

In 1965 Massachusetts promulgated a Racial Imbalance Law designed both to promote racial balance and to eliminate racial imbalance in its public schools. Under that law, local school committees were required to conduct an annual racial census, and if the census showed the existence of imbalanced schools (greater than 50% nonwhite), to file with the Board plans to eliminate the imbalance. (Mass. Gen. Laws ch. 71, § 37D, Pet. App. pp. 61-63). The Board, in turn, was given supervisory and enforcement powers, including the power to require implementation of plans that revised internal district boundaries and required transportation of students. (Mass. Gen. Laws ch. 15, §§ 1I-1J, § 37C, Pet. App. pp. 58-63).

The first racial census in 1965 showed Springfield to have six racially imbalanced elementary schools. Of these, one was closed and five remained continuously imbalanced and, indeed, worsened from 1965 to June of 1974 (Pet. App. p. 4).

From 1965 to 1972 there were a series of agreements, administrative actions, and adversary court proceedings as the Board attempted to secure compliance from Petitioner with the Racial Imbalance Law (Pet. App. pp. 4-5). In *School Committee of Springfield* v. *Board of Education* (*Springfield I*), Mass. Adv. Sh. (1972) 1543, 287 N.E. 2d 438, the Supreme Judicial Court disapproved of an ad-

ministrative action taken by the Board but ordered Petitioner to adopt and implement a plan to racially balance all Springfield schools by September of 1973. In November of 1972 Petitioner represented to a court and to the Board that the school committee would file such a plan with the Board by early 1973. Petitioner neither adopted nor put into effect any such plan (Pet. App. pp. 5-6).

When no plan had been filed by June of 1973 the Board obtained a court order requiring Petitioner to file such a plan immediately. A four-page "plan" to balance two grades was filed and the Board commenced administrative proceedings. (Pet. App. pp. 5-6). A citizen's group, the Quality Integrated Education Committee, intervened in the administrative proceedings, was a party in proceedings before the Supreme Judicial Court, and has filed a brief in opposition to certiorari (hereinafter "Respondent Intervenor").

As a result of these proceedings the Board on October 12, 1973 issued an "Opinion and Order" directing Petitioner to implement a plan prepared by the Springfield School Department ("Task Force Plan".) Petitioners sought judicial review of the Order and the Board counterclaimed for enforcement. While review was pending, the Board obtained a series of court orders requiring Petitioner to submit and comply with a schedule for implementing the plan. (Pet. App. pp. 6-7). On May 1, 1974 the Supreme Judicial Court in the *Springfield II* decision, Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69, rejected all of Petitioner's claims, affirmed the Board order, and granted the Board's counterclaim for enforcement. Although a single Justice of the Supreme Judicial Court retained jurisdiction to ensure implementation, Petitioner complied with Board orders to implement the Plan. By the time of the subsequent proceedings before the Supreme Judicial Court, virtually every step needed for implementation had

been taken, including change in district lines, completion and notification of pupil and teacher assignments, completion of a transportation and safety plan, ordering of additional vehicles, and the conducting of community education programs. "Springfield had in fact achieved a racially balanced school system." (Pet. App. pp. 14-15).

On July 26, 1974 an amendment to the Racial Imbalance Law was enacted, which, among other changes, deprived the Board of the power to order redistricting or transportation as part of a racial balance plan. Mass. St. 1974, ch. 636, § 1 (Pet. App. pp. 44-47; Pet. App. p. 10). On August 1, 1974, a majority of Petitioner school committee voted (1) to direct its staff to cease implementing the plan without further approval, and (2) to reopen the schools in September 1974 with the same grade structure and organization as the prior year. (Pet. App. p. 10). These votes were inconsistent with Board and Court orders. (Pet. App. p. 6 n. 8).

On August 2, 1974, the petitioner filed a motion with the Supreme Judicial Court that it vacate its prior final decree. (Pet. App. pp. 10-11). The Board filed an administrative "Opinion and Order" with the Court on August 13, 1975, opposing the motion to vacate. The Attorney General's Office, despite the expressed position of the Board, supported the motion to vacate while appearing in the name of the Board before the Court. (Pet. App. p. 11 n. 14). The Respondent Intervenor opposed the motion to vacate.

After oral argument, the Supreme Judicial Court entered an order on August 22, 1974, denying the motion to vacate (Pet. App. p. 11; Res. Int. App. C, p. 16). The Court's opinion was issued November 12, 1974. That same day a rescript was entered that did not itself contain an order but simply referred to the order of August 22, 1974. (Res. Int. App. D, p. 17).

Argument

I. Because the Petition for Certiorari Was Not Filed Within Ninety Days After Entry of the Supreme Judicial Court Order, There Is No Jurisdiction to Entertain the Petition.

The petition for certiorari seeks review of the action by the Supreme Judicial Court of Massachusetts denying petitioner's motion to vacate a final decree entered earlier by that Court in *School Committee of Springfield* v. *Board of Education,* Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69. (Res. Int. App. A). On August 22, 1974, the Supreme Judicial Court entered an order denying the motion to vacate. (Res. Int. App. C). No further orders or judgments were entered after entry of the August 22, 1974 order. On November 12, 1974, that Court issued an opinion explaining the reasons for the August 22, 1974 order (Pet. App.), and subsequently issued a rescript. (Res. Int. App. D).

The time period under 28 U.S.C. § 2101 (c) for filing a petition for certiorari in this case expired on November 20, 1974, ninety days after the August 22, 1974 order. The petition for certiorari was actually filed on February 10, 1975. The ninety day time period for filing the petition for certiorari ran from the date of the entry of the state court's decree or order, on August 22, 1974, not from the state court's opinion.[1] *Scofield* v. *NLRB,* 394 U.S. 423, 427

[1] No particular hardships were imposed on petitioner's rights of review by the fact that the ninety day period expired eight days after the issuance of the Supreme Judicial Court's opinion. Anticipating an opinion, Petitioner might easily have applied for an extension of time to file a petition for certiorari, Sup. Ct. Rule 22 (1), or filed a petition stating probable grounds for review and sought leave to amend later. Had no opinion been issued, it would have been free to seek review within the proper time limits. *Dixon* v. *Duffy,* 342 U.S. 33 (1951).

(1969); *Puget Sound Power Co.* v. *King Co.*, 264 U.S. 22, 23-25 (1924).

This Court's jurisdiction under 28 U.S.C. § 1257 is to review final judgments or decrees of state courts not opinions. 28 U.S.C. § 2101 (c) restricts this Court's jurisdiction over state civil cases to those in which review is sought within ninety days of the entry of a reviewable judgment. *Cox Broadcasting Co.* v. *Cohen*, 43 U.S.L.W. 4343, 4356 (U.S. March 3, 1975) (Rehnquist, J., dissenting).

It was the August 22, 1974 order that "in fact fully adjudicated rights and . . . [was] not subject to further review by [the] state court," and so constituted the "judgment or decree" pursuant to 28 U.S.C. § 1257. *Dept. of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); see also *Market Street R. Co.* v. *R.R. Comm'n.*, 324 U.S. 548, 551-552 (1945). The Springfield public schools opened in September under the Racial Balance plan that had been approved by the Supreme Judicial Court in the Spring of 1974, thus complying with the August 22 order denying the motion to vacate (Pet. App. p. 2 n. 3). The Supreme Judicial Court itself considered the August 22, 1974 order to be the final decree in the case: the subsequent opinion merely stated the reasons underlying that order and contained no order or judgment (Pet. App. pp. 2, 11). This is consonant with the distinction in Massachusetts law between orders or judgments and opinions.[2] Mass. Gen. Laws,

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[2] It is a peculiarity of Massachusetts procedure that for state law purposes, the final decree is usually the decree entered after rescript from the full Supreme Judicial Court to the lower court. In the instant case, the final decree is not in the rescript, which contains no order or judgment (Res. Int. App. D), but in the August 22, 1974 order. *Cole* v. *Violette*, 319 U.S. 581 (1943), holds that the time period in 28 U.S.C. §2101 (c) starts to run from the order by the Supreme Judicial Court directing a lower court to enter the final decree. Under the *Cole* rule, this Court has specifically adopted a test for Massachusetts cases of the 28 U.S.C. §1257 "judgment or decree" being the earliest order entered by the Supreme Judicial

ch. 211, §§ 8 and 9 (Res. Int. App. F). Because the filing of this petition for certiorari was not timely, it should be denied.

II. Review Should Be Denied Because the Judgment Below Rests on Adequate Non-Federal Grounds.

The majority opinion of the Supreme Judicial Court based its denial of petitioner's motion to vacate on Articles I and X of the Declaration of Rights of the Massachusetts Constitution and alternatively on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Pet. App. pp. 14 and 15). The concurring opinion was based on entirely state grounds (Pet. App. pp. 23-28), and there was no dissenting opinions.

This Court should not assume jurisdiction because the Massachusetts law grounds are adequate to support the judgment, are independent of federal law, and are clearly tenable. *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1875). Where the judgment rests alternatively on state and federal constitutional provisions, this court will deny review. *Jankovich* v. *Indiana Toll Road Comsn, Ind.,* 379 U.S. 487 (1965). As in *Jankovich,* and unlike *Dept. of Mental Health* v. *Kirchner,* 380 U.S. 194 (1965), the state court here expressly and without ambiguity relied on state constitutional grounds. Further, its holding as to the content of those state constitutional guarantees was not reached under the compulsion of federal law, see *State Tax Comm'n* v. *Van Cott,* 306 U.S. 511 (1939), but independently. The Supreme Judicial Court has held that the guarantees of

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Court that fully determines the rights of the parties. See also *Commissioner of Education* v. *School Committee of Leyden,* 358 Mass. 776, *cert. den.,* 404 U.S. 849 (1971). In the case at bar the earliest order, indeed the only order, was entered on August 22, 1974.

Articles I and X of the Massachusetts Constitution are *at least* as great as those in the equal protection clause. *Opinion of the Justices,* Mass. Adv. Sh. (1973) 1027, 1036, 298 N.E.2d 840, 846; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.,* 281 Mass. 303, 320 (1933). State courts are free to interpret state statutes and constitutions more broadly than the federal counterparts. *Oregon* v. *Hass,* 43 U.S.L.W. 4417, 4418-19 (U.S. March 19, 1975). The state court's decree rests adequately on state law grounds and provides no basis for departure from this Court's well established rule against review. Further, in the circumstances of this case, this Court should not exercise its discretion to grant certiorari because in all probability its opinion would be advisory and a needless decision of a constitutional issue. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945); *Cox Broadcasting Co.* v. *Cohn,* supra (Rehnquist, J. dissenting); cf. *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549 (1947).

III. Review Should Be Denied Because the Decree Below Was Correct and in Accord With the Decisions of This Court.

The decision below is clearly correct under this Court's rulings. Petitioner's actions to reinstitute a segregated school system were properly held unconstitutional.

Petitioner's two basic arguments misconceive and misstate the holding of the Supreme Judicial Court. First, Petitioner argues that because it had not, prior to August 22, 1974, been adjudicated guilty of *de jure* segregation in its public schools,[3] there could be no violation of

[3] Petitioner's practices were the subject of challenge in *Barksdale* v. *School Committee of Springfield,* 237 F. Supp. 543 (D. Mass. 1965), where plaintiffs successfully argued that segregation caused

the Fourteenth Amendment in granting its motion to vacate and allowing it to reinstitute its previous structure of segregated schools (Pet. pp. 9-12). Secondly, Petitioner argues that the Supreme Judicial Court impermissibly "locked [the Massachusetts legislature] into its initial structure [for the Racial Imbalance Law] and . . . forever prevented it from making any meaningful amendments" (Pet. p. 24). Neither argument has merit.

The Supreme Judicial Court decided that where, pursuant to a judicial decree, a school system had taken a number of steps and had "in fact achieved a racially balanced school system," a school committee's return to prior segregated schools legitimated by the court's rescission of its decree would be an unconstitutional act of *de jure* segregation (Pet. App. pp. 14-15). The state court found that "substantially every action which was necessary to the implementation of the Task Force plan was taken," and listed those actions (Pet. App. pp. 14-15). This, the Court found,

> . . . in effect created a new status quo in which every elementary school is racially balanced. If, now that that new status quo has been substantially achieved, either the school committee or the Legislature act so as to resurrect the pre-existing school structure, the resulting racial segregation in the five elementary schools would clearly be State imposed and thus unconstitutional. Events have simply moved too far to permit such a reversion.
> (Pet. App. pp. 22-23).

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deprivation of equal educational opportunity, without focussing on whether the segregation was *de facto* or *de jure*. The First Circuit Court of Appeals reversed, finding that the theory of recovery did not accurately reflect the law. *School Committee of Springfield* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965). No case has yet been brought against Petitioner on a *de jure* segregation theory, although the author of the concurring opinion in the Supreme Judicial Court calls Petitioner's policies "of dubious constitutionality." (Pet. App. p. 27).

Thus, the Court held that in the circumstances of this case, the reversion voted by Petitioner on August 1, 1974 and sought through the motion to vacate would constitute intentional, purposeful governmental action that would result in segregated schools. This is the very definition of unconstitutional, *de jure* segregation. *Keyes* v. *School Dist. No. 1, Denver Colo,* 413 U.S. 189, 208 (1973); (Pet. App. pp. 16-17 n. 21). Because the reversion would require the action of the school committee and the legislature there can be no question of state action. In this context it is simply irrelevant whether the original cause of the segregation was *de facto* or *de jure.* Also not pertinent is the statement from *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 24 (1971) relied on by Petitioner, that the Constitution does not require racial balance. A state's voluntary efforts to eliminate racial imbalance in its public schools are constitutional. *Swann,* supra, at 16; *School Committee of Boston* v. *Board of Education,* 352 Mass. 693 (1967), app. dismissed for want of subst. federal question, 389 U.S. 572 (1968); *Offermann* v. *Nitkowski,* 248 F. Supp. 129 (W.D.N.Y. 1965), aff'd, 378 F.2d 22 (2d Cir. 1967). See also *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). The Supreme Judicial Court did not find unconstitutional a failure to remedy *de facto* segregation, but rather found unconstitutional intentional governmental action designed to re-create a virtually eliminated condition of segregation in the schools.

As to Petitioner's second argument, the Supreme Judicial Court addressed itself to the unique circumstances of this case and did not, as claimed, lay down a broad restriction on the exercise of the legislative power to amend. The state court decided only the case before it, as it repeatedly notes (Opinion below, Pet. App. p. 14 "in the circumstances of this case," p. 15 "in these circumstances," p. 32, "in this setting," "at this stage.") Its decision was clearly correct and in accord with the rulings of this Court.

The decision of the Supreme Judicial Court on the federal constitutional issue was based primarily on two lines of cases. The first line of cases consistently holds that rescission of public school racial balance plans and attempts to return to the *status quo ante* constitute *de jure* segregation in violation of the Fourteenth Amendment, and in none of the cases was this holding reversed on appeal. *Keyes* v. *School District No. 1, Denver, Colo.*, 303 F. Supp. 289, 295 (D. Colo. 1969), aff'd and rev'd on other grounds, 413 U.S. 189, noted at 199 n. 10 (1971); *Bradley* v. *Milliken*, 433 F.2d 897, 904 (6th Cir. 1970), rev'd on other grounds but upheld on this issue, 418 U.S. 717, 738 n. 18 (1974); *Brinkman* v. *Gilligan*, (S.D. Ohio #72-137, Feb. 7, 1973), aff'd, 503 F.2d 684 (7th Cir. 1974); *Oliver* v. *Kalamazoo Bd. of Educ.*, 346 F. Supp. 766, 780 (W.D. Mich. 1970), aff'd, 448 F.2d 635 (6th Cir. 1971), 508 F.2d 178 (1974); *Martin* v. *Evansville-Vandenbergh Sch. Corp. of Evansville*, 347 F. Supp. 816, 820 (S.D. Ind. 1972). The case at bar is perhaps stronger than these precedents because the unconstitutional activity was not the mere rescission but rescission after the status of segregation had in fact essentially been eliminated.

The second line of cases relied on by the Supreme Judicial Court, stemming from *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), provides direct support for its holding. See also *Lee* v. *Nyquist*, supra. In the context of the *Reitman* analysis of "historical context," "immediate objective," and "ultimate effect," the Supreme Judicial Court made the following findings:

> Similarly, in the present case, it is quite clear that the school committee, although not barred by c. 636, will not voluntarily order the redistricting and busing which is integral to the Task Force plan. And from the past efforts in Springfield it is equally clear that racial balance cannot be achieved without such redis-

tricting and busing. Thus, in this setting, by depriving the board of its power to require the use of effective measures for the elimination of racial imbalance, c. 636 is, in effect, 'an authorization to discriminate.' (Opinion below, Pet. App. p. 22).

Thus the Court specifically found that Chapter 636 did not, in this context, have a racially neutral effect and most certainly did not have a racially beneficial effect, as argued by Petitioner. (Pet. p. 18). The Court found that Petitioner's construction of Chapter 636 would constitute "State action serving to continue segregation in the schools and thus 'significantly . . . [involve] the State' in . . . racial discrimination." (Pet. App. p. 22).

Conclusion

It is respectfully submitted that the petition for certiorari was not timely, that the judgment below was based on adequate and independent state grounds, and that granting of review would infringe important federal judicial policies. It is also submitted that Petitioner has failed to sustain its burden under Rule 19 of establishing that there are important reasons to grant review. This case presents no novel questions to this court. The judgment below was squarely in accord with the applicable decisions of this Court. Certiorari should therefore be denied.

Respectfully submitted,

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